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REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI.

BY CHAS. C. WHITTELSEY,
REPORTER.



VOL. XXXVI.

ST. LOUIS:
GEORGE KNAPP & CO., PUBLISHERS.
1866.

Entered according to Act of Congress, in the year 1866, by

GEORGE KNAPP & CO.,

In the Clerk's office of the District Court of the Eastern District of Missouri.

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C A S E S

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI,

JULY TERM, 1886, AT JEFFERSON CITY.

— ♦ ♦ ♦ —

BARBARA SCHULTZ, Plaintiff in Error, v. THE PACIFIC RAIL-
ROAD, Defendant in Error.

36	18
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Damages—Loss of Life.—Under the second section of the “Act for the better security of life and property,” (R. C. 1855, p. 647,) the representatives of a servant can maintain an action against the master, if the death be occasioned by the negligence, unskillfulness or criminal intent of a fellow-servant. The burden of proof is upon the plaintiff to show negligence in such cases.

Error to Cole Circuit Court.

Plaintiff, as the widow, brought her action under the statute for the better security of life, property and character. The petition alleged that plaintiff's husband received an injury, of which he died, resulting from the negligence, unskillfulness and criminal intent of the officers, agents, servants and employees of defendant while running, conducting and managing the locomotive and cars on its railroad near the city of Jefferson. The answer alleged that plaintiff's husband was a fellow-servant of the servants and employees of defendant, who were running the cars at the time the collision (causing the death) occurred.

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Plaintiff offered evidence sustaining or tending to sustain the allegations of the petition, that the collision of the cars resulted from gross negligence or criminal intent of Harrington, who had charge of the engine and locomotive when this collision happened. It also appeared that Schultz, the husband of plaintiff, was a day laborer, employed and paid by the day; that at the time of the collision he, with other laborers, was on a wood train, which was ascending the road with wood brought from a point some miles below Jefferson City, and when within about half a mile from the latter place the train came in contact with a locomotive descending the track from the dépôt at Jefferson, in charge of Harrington.

The evidence shows that Harrington had been in the constant employment of the company for a year or two; that Schultz was an occasional and irregular laborer, employed by the day.

When the evidence was closed, plaintiff asked the following instructions:

1. If the jury believe from the evidence that Benedict Schultz was the husband of this plaintiff, and that the said husband of plaintiff died within six months before the commencement of this suit, from injuries resulting from a collision which took place, in the county of Cole, between a locomotive of defendant descending its railroad from its dépôt in the city of Jefferson, and a locomotive car and train of said defendant, on which was plaintiff's husband, at the time and by the consent of its conductor, which was ascending said road toward Jefferson City; and that said collision was occasioned by the negligence, unskillfulness or criminal intent of an officer, servant or employee of defendant, whilst running, conducting and managing said locomotive so descending said road, then the jury will find for the plaintiff, and will return a verdict for five thousand dollars.

2. If the jury believe from the evidence that the plaintiff's husband died from injuries resulting from a collision of

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the locomotive and cars of defendant, whilst an officer, servant or employee of defendant was running, conducting and managing the locomotive which was descending the said road as stated in first instruction, this is presumptive proof of negligence, and it devolves upon the defendant to show that it was chargeable with no default.

8. The jury will determine from all the evidence whether the servant or employee of defendant, while running, conducting and managing the locomotive which came in collision with the train ascending the said road, exercised the care and foresight of a prudent man; and the absence or want of such care and foresight is what is meant by negligence, as used in the first instruction.

All of which were objected to by defendant, and were refused by the court. To the opinion of the court in sustaining the objection and refusing instructions, the plaintiff excepted.

The court, at the request of the defendant, gave the following instructions :

1. If the jury shall believe from the evidence that Benedict Schultz was the husband of plaintiff, and was, at the time of the collision on the road of defendant, a servant or employee of defendant, and that the death of said Benedict Schultz was caused by the act of Harrington, and that said Harrington was at said time also a servant or employee of defendant, then the jury will find for the defendant, unless the jury shall further believe from the evidence before them that said Harrington was an incompetent servant or employee, and that the defendant failed to exercise ordinary care in his selection.

2. The defendant is not responsible for injuries to its servants or employees resulting from the act of a fellow-servant or employee, unless the servant committing such injury be incompetent to fill the position in which he may be employed, and that the railroad company failed to exercise ordinary care in his selection.

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8. It devolves upon the plaintiff to show that Harrington was an incompetent servant or employee in the particular department in which he may have been employed, or in which he may have been engaged, and that the railroad company, in the selection and appointment of said Harrington, failed to exercise ordinary care.

4. It is not sufficient to entitle the plaintiff to recover, for her to show that the death of Schultz was caused by any act of Harrington, willful or with a criminal intent or otherwise, if the jury shall believe that both Harrington and Schultz were, at the time of the injury, servants or employees of defendant, unless they shall further find from the evidence that the injury resulted from the act of Harrington, and that said Harrington was an incompetent servant, not qualified to discharge the duties which devolved upon him; and further, that defendant in the selection of said Harrington did not exercise ordinary diligence.

5. That although the jury may believe from the evidence that the fireman Harrington may have run the engine below the wood-yard and water-tank of defendant, and that such act was contrary to the rule and custom of defendant, and was improper in itself, and that the death of plaintiff resulted from his carelessness or negligence in so doing, yet such unauthorized act of said fireman Harrington does not render the defendant liable to plaintiff in damages for the loss of her husband, unless the jury shall further find from the evidence that said Harrington was an incompetent servant, and that the company failed to exercise ordinary care in his selection and appointment; provided the jury shall further find that said Schultz was, at the time of his death, a servant of defendant and in its employ.

6. No particular length of service, nor any specified or agreed term of hiring or employment, is necessary to constitute Schultz a servant or employee of defendant; nor is it necessary for defendant to prove that Schultz was in any particular class of employees or servants to exonerate defendant from liability for injuries received by him from a

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fellow-servant, whilst both such servants were in the actual employment of defendant.

To the opinion of the court in overruling the objection of plaintiff and giving said instructions, plaintiff excepted. The plaintiff thereupon took a non-suit and filed a motion to set aside the judgment and for a new trial.

Ewing & Muir, for plaintiff in error.

I. The case of *McDermott v. The Pacific Railroad* is unlike the case at bar. The defendant is liable at common law according to the following authorities: *Gillenwater v. Madison & Ind. R.R.*, 5 Porter, Ind., 340; *Fitzpatrick v. New Albany & Salem R.R.*, 7 Ind., 436; *Chamberlain v. Mil. & Miss. R.R.*, 11 Wis. 250; *Ohio St. R.* 210; 20 Ohio, 415.

II. This action is clearly maintainable under the statute if not at common law, and the authorities cited by counsel for defendant do not apply. (1 R. C. 1855, p. 647.) This is evident from the terms of the second section, as well as from the scope and meaning of the whole act. The words are, "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive car or train of cars," &c. Another clause of same section says: "When any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, &c., the corporation or individual in whose employ such officer, agent, &c., shall be, or who owns such railroad, locomotive, car," &c., "shall forfeit and pay for every person or passenger so dying," &c.

The restrictive terms of the last clause limiting the liability of company to injury received by passengers, show what is meant by the phrase "every person," in the first clause; and that the intent of the Legislature in enacting this law, was to embrace employees as well as passengers. The use of general and comprehensive terms in one clause, and of the

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restricted terms in another part of the same section, clearly shows that the mind of the law-maker discriminated between classes of persons, and that the words of the act were used in the distinctive sense their ordinary and obvious import would imply. If passengers, only, were intended in the first part of the section, why were the terms "any person" used to express that intent, when, as in another part of the same section, in creating a liability for injuries to passengers caused by other agencies, it was necessary to express the intent by using the term "passengers"?

There are but two classes who are comprehended by the act, and who travel on railroads—passengers and employees; and as employees are excluded from the benefit of the second clause referred to, because the law expressly limits the liability as to passengers only, so the employees must be held to be comprehended in the first clause, because its terms clearly include them under the designation of "any person." The third sustains the interpretation we have given of the second section. In the third, a right of action is given for injuries caused by other agencies than railroad employees, &c., provided an action could have been maintained by the injured party (if death had not ensued) before the passage of this statute, &c., at common law. The cause of action must have been good at common law under that section, and the statute only says the action shall not abate by the death of party injured, and that the surviving wife or husband, father or mother, &c., as the case may be, may sue, and that certain damages may be recovered. In other words, its provisions related only to the remedy. In the second section there is no such qualification as to the cause of action.

If there was no liability by the company for injuries caused to one servant by the negligence of his fellow-servant at common law, then the second section of this statute creates such a liability. There are obvious reasons, too, for such a distinction in the great risk and peril in which human life is placed by the agencies mentioned in the second sec-

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tion, and the absence of any means on the part of passengers, as well as most employees, to avert danger and guard against such perils. The Legislature wisely ignored any distinction between passengers and those who, although employees of railroad companies, &c., are in most cases as little cognizant of the conduct, qualifications or habits of other employees of the same company as passengers, and are entitled at least to equal, if not greater, protection.

The interpretation of the statute insisted upon is sustained by all sound rules of construction. The intent of the law-maker must be sought for in the words, and when the intent is apparent on the face of the act—when there is no obscurity in the meaning, obscurity must never be created by construction. (81 Har. R. 72; Smith's Com. 822.) It is not admissible to restrain the operation of a statute within narrower limits than the words import, unless the court are satisfied that the literal meaning of its words would extend to cases which the Legislature never designed to include in it. (14 Peters' R. 178; Smith's Com. 822.)

When the Legislature have used words of definite import, it would be dangerous to put upon them a construction which would amount to holding that the Legislature did not mean what they had clearly expressed. The fittest course in all cases where the intention is brought in question, is to adhere to the words of the statute, construing them according to their nature and import, in the order in which they stand in the act, rather than enter upon an inquiry as to the supposed intention. (Smith's Com. 831.) Neither are courts to presume the intention of the Legislature, but they are to collect it from the words of the act. Applying the rules governing in the construction of penal statutes, (to which class the one under consideration does not in any proper sense belong,) the same conclusion must follow.

Penal statutes, although construed strictly, are not to be construed so strictly as to defeat the obvious intention of the Legislature; and the words are not to be so narrowed down

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as to exclude cases which those words in the ordinary adaptation, or in that sense in which the Legislature obviously used them, would comprehend. (5 Wheat. 76 to 94; Smith's Com. 810.) The rule only means this, that they ought not to be extended by their spirit or equity to other offences than those which are clearly prescribed or provided for. (Smith's Com. 841; see U. S. v. Winn; 3 Sum. 211, & Smith's Com. 845, a case directly in point.)

The cases cited by counsel for defendant in error, so far as they involved the construction of statutes, had reference to statutes that only gave a remedy to certain surviving relatives of the deceased when a cause of action previously existed, and could be maintained at common law; and are like the provisions of the third section of our statutes, but wholly dissimilar from the second section. (Pierce, Rail. 257, n. 1, 258-9, 260-61, notes.)

The general doctrine insisted on by defendant in error has been applied to the construction of statutes, which have been enacted in England and the United States, giving to the personal representatives of a deceased party, who was killed by the carelessness or willfulness of another, a right to recover damages of the wrong-doer, whenever the death is caused by acts, neglects, &c., which are such if death had not ensued, the injured party would have been entitled to recover damages for the injury. (Pierce, Rail. 293, and authorities there cited; Sherman v. ——— R.R., 15 Barb. 574; 20 *id.* 449; Pierce, Railw. 260, n. 1, as to careful discrimination in statutes of other States giving remedies in similar cases to surviving relatives, between employees and passengers.)

For the foregoing reasons the first instruction asked by plaintiff should have been given, and all those given for defendant should have been refused.

The second instruction of plaintiff was a proper declaration of law. (Pierce, Railw. 493, and authorities there cited, as is also the third instruction. (Redfield, Railw. 323, *et seq.*)

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The case was submitted for defendant, upon a brief previously filed by Attorney General Welsh, since deceased.

Welch, for defendant in error.

I. A railroad company is not responsible in damages for an injury received by one servant at the hands of another, unless the servant by whose negligence the injury is occasioned is not possessed of ordinary skill and capacity in the business entrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the company. (*McDermott v. Pacific R.R.*, 30 Mo. 115; *Priestly v. Fowler*, 3 Mees & Wels, 1; *Murray v. So. Car. R.R.*, 1 McMullen, 385; *Farwell v. Boston & Worcester R.R.*, 4 Metcalf, 49; *Hayes v. Western R.R.*, 3 Cush. 270; *Coon v. Syracuse & Utica R.R.*, 6 Barb. 231; *ibid.* 3 Comst.)

II. This rule is not restricted to servants employed in the same particular class or kind of business, but applies to all servants in the employ of the same employer. (*McDermott v. Pacific R.R.*, 30 Mo. 115; *Redfield, Railw.* 387; *Farwell v. Boston & Wor. R.R.*, 4 Metc. 49.)

HOLMES, Judge, delivered the opinion of the court.

The petition sets forth a cause of action founded upon the second section of "An act for the better security of life, property and character," first enacted in this State in the year 1855. (R. C. 1855, p. 647.) This section, so far as it may have a bearing upon the present case, provides that whenever any person shall die from any injury, resulting from, or occasioned by, the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car, or train of cars; * * and when any passenger shall die from any injury resulting from, or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car; * * the corporation, individual or individuals, in whose employ any such officer, agent, servant,

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employee, &c., shall be, at the time such injury is committed, or who owns any such railroad, locomotive, car, &c., at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars." That these damages may be sued for and recovered by the husband or wife of the deceased, among other representatives particularly designated; and that "in suits under this section, it shall be competent for the defendant for his defence to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency."

The rhetorical construction here is somewhat careless, involved, and obscure; but upon a close examination it would seem to be sufficiently clear that the true intent and meaning of the act as it reads is, that when any person whatever shall die from any injury occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car, or train of cars; or whenever any passenger shall die from any injury occasioned by any defect or insufficiency in the railroad itself, or in any part thereof, or in any locomotive or car, the corporation or individual in whose employ such officer, agent, servant or employee shall be at the time the injury is committed, (that is, if the case be of a person dying from an injury occasioned by the negligence, unskillfulness, or criminal intent mentioned in the first clause,) or the corporation or individual who owns any such railroad, locomotive or car, at the time an injury resulting in death is occasioned, by any defect or insufficiency in the railroad, or any part thereof, or in any locomotive or car, shall, in either case, forfeit and pay the sum named, for the benefit of the designated representatives of the deceased party.

Since the introduction of these new and hazardous modes of travel, which require unusual care, diligence and skill on the part of the officers, agents and servants, who are en-

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trusted with the management and control of moving trains and dangerous machinery, and with the performance of the various duties and services belonging to the details of combined operations, wherein the utmost faithfulness and certainty are demanded, the numerous and frequent disasters to life and limb which have happened, and are constantly happening—whether by the negligence or incompetency of the persons employed, or by reason of defective machinery or insufficient construction, or mere unavoidable accident—the natural and inevitable result and consequence of the adoption and use of these more dangerous means of carrying on the ordinary business of life have led communities in many States to conceive that there ought to be some greater security for life and property in these cases, and some more adequate compensation and redress for injuries suffered in this way, than has been heretofore attainable by the ancient principles of the common law alone; and at the same time, in many of those instances in which the common law has afforded an ample remedy, it has been felt that there was need that the sympathies and extravagances of inconsiderate juries, not unfrequently resulting in unreasonable and inordinate damages, should be controlled by some limitation and restraint. To what extent it may be wise or politic to modify the settled rules of law in order to adapt them to these new exigencies, it belongs to the Legislature, and not to the courts, to determine and prescribe.

We may observe, however, that some changes have been made by statute in other States and countries. The British statute, commonly called Lord Denman's Act, (9 & 10 Vic., ch. 93,) provided merely that an action might be maintained by certain personal representatives of the deceased party for damages, to be proportioned to the injury resulting to such representatives from the death of the injured person, where no action otherwise could have been sustained at common law by reason of the death of the party; but it did not in any way change or modify the grounds of the liability. This act, with more or less of alteration in minor de-

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tails, in some instances has been substantially adopted in several States of the Union. In New York and New Hampshire, the damages are restricted (as in our act) to the sum of five thousand dollars in all cases. Under the Massachusetts statute, the remedy is by indictment for a penalty, which goes to the widow and heirs, not as compensation or damages for any supposed injury to them personally, but rather as a gratuity from the commonwealth: and it is expressly confined to cases of the death of "a person, being a passenger." The statute of New Hampshire is also strictly limited in its operation to persons "not in the employment of the corporation," or individual defendant. (Pierce's American R. Law, 260, n. 1). The third section of our statute is almost literally copied from the British act; and, like that act, it does not change or affect the common law principles constituting the original ground of the liability; but this second section goes much further, and makes several important changes in the law not contained in any of the statutes of other States which we have had an opportunity to examine. They will demand a particular consideration.

There can be no doubt that the second clause of this second section, beginning with the words "and when any passenger," refers exclusively to passengers carried as such, and includes only injuries resulting in death occasioned by some defect or insufficiency in the railroad, or some part thereof, or in some locomotive or car.

In this respect, and so far as the principles of law governing the liability are concerned, it makes no change in the previous law of carriers of passengers. Common carriers are insurers of goods against every thing but the act of God and public enemies, but they are not insurers of the personal safety of passengers; and they are liable only for want of due care, diligence and skill, being responsible for the slightest neglect. (2 Greenl. Ev. sec. 221; Bennett v. Dalton, 10 New Hamp. 481.) They are not liable for injuries happening to passengers by mere accident. (Ang. Carr.

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§ 521.) But carriers by railroads, as by coaches or other vehicles, are held responsible for the good travelling order and condition of the road, the sufficiency of the construction of the road and its rolling machinery, and the road-worthiness of engines, cars, and carriages; and they are liable at common law for deficiencies and insufficiencies in these respects. (Ang. Carr. § 588.) This part of the act amounts to no more than an express recognition of the same principles in reference to the ground of the liability; but it proceeds further to limit the recovery of damages to five thousand dollars, to designate the personal representatives of the injured person who may maintain an action, and to provide that the defendant may show in his defence, that such defect or insufficiency was not the result of negligence on his part. Here again the act merely recognizes the general rule of law; for this provision is in accordance with a principle of the law of carriers of passengers, applicable to them in their character and relation of common carriers, namely: that although the bare fact of an injury received by a passenger will not be sufficient to warrant a presumption of negligence, yet when an injury is proved to have resulted to a passenger from the breaking of defective machinery, insufficiency of construction, or other like accident occurring to moving trains—that is to say, causes which are of such a nature as of themselves to import and imply some negligent defect or insufficiency in the railroad or its running machinery—a presumption of negligence arises which is deemed sufficient to throw the burden of proof upon the defendant to show that the requisite care and diligence have been duly exercised. (Pierce's Am. R. Law, 492–3.) And so this clause makes the fact of the death of a passenger, resulting from such defect or insufficiency, to have the effect of being *prima facie* evidence of negligence. When these facts are made to appear, the burden of proof is, by force of the statute, shifted upon the defendant, and he is allowed to show in his defence, that there was no negligence on his part in those

particulars, and that the utmost care and diligence have been used.

But this part of the act, it is very plain, does not reach the case in hand: for the injured person here was not a passenger; and, in reference to him, the defendant did not stand in the relation of carrier and passenger, but in that of master and servant. Nor does he appear to have been injured in that particular way.

Now, looking to the first clause of the section in question, we see that it begins with the words, "whenever any person," and there are no words in the section which can have any effect to limit the description or character of the person so dying to any class. The next clause opens with a change of language and subject, and a change of the ground of liability from negligence, unskillfulness or criminal intent, in officers, agents and employees, to defects or insufficiencies in the railroad or its running machinery; and in the closing sentence which fixes the amount of the damages, the words "person or passenger" are both used, and disjunctively. But the negligence, unskillfulness or criminal intent for which the employer is to be held liable in this manner, is expressly confined to some officer, agent, servant or employee, whilst running, conducting or managing a locomotive, car, or train of cars; and, of course, this part of the act can be applied to the negligence, unskillfulness or criminal intent of no other persons and to no other state of facts.

The framer of the act evidently undertook to carry two distinct propositions, concerning two classes of persons, and relating to two different and distinct grounds of liability, through one lengthy period; and, as he proceeded, found it necessary to infold and involve them in an alternate series of expressions, which are applicable separately to each in their order, at some expense of rhetorical clearness and precision, but winding up with one and the same conclusion as to both, the prescribed penalty of five thousand dollars damages. Consequently, when the liability of the employer is declared

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in reference to the first clause, it is the corporation or individual "in whose employ any such officer, agent, servant or employee," shall be at the time the injury is committed, that is to be liable, and plainly in respect of the negligence, unskillfulness or criminal intent of such officer, agent, servant or employee, whilst running, conducting, or managing the engines, cars, or trains; but when the other clause relating to passengers only, becomes the subject of the sentence, it is the corporation or individual who owns the railroad, locomotive, car, or train, in which the defect or insufficiency which is then the ground of the liability, may exist, that is declared to be liable.

The obscurity which alone creates any difficulty in the interpretation of the act, arises from a certain ambiguity in the grammatical construction, whereby it is made possible to read the phrase "resulting from or occasioned by any defect or insufficiency above declared," as applying to and qualifying both members of the preceding sentence, and as thus limiting the whole liability, which is affirmed in the section, to the second clause alone, grounded on a defect or insufficiency in the road or its machinery. This construction would render the whole of the first clause of the section entirely nugatory, and it cannot be allowed. It is a maxim governing the construction of statutes, that the intent and meaning of the Legislature, to be gathered partly from the words and partly from the mischief which the statute was intended to remove, is to be taken as the controlling rule of interpretation, and even penal statutes are not to be so strictly construed as to defeat the obvious intention of the Legislature. (Smith's Corn., § 703; *United States v. Witburgher*, 5 Wheat. 95; *United States v. Winn*, 8 Sum. 211.) This intent, indeed, is to be collected from the language of the act; but the difficulty here arises not so much from any want of adequate expressions covering and containing the construction and sense we have given to it, as from a possible interpretation, which, if adopted, would have the effect to contradict the express words of a part of the act, render

one entire clause wholly inoperative, and defeat the manifest object and intent of the Legislature. Such forced construction would be too dangerous to be admitted. (Smith's Com., § 715.)

We must conclude, then, that the true purport of the statute is, that whenever any person whatever, whether a passenger or an employee, a fellow-servant or a mere stranger, shall die from any injury which is occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing the engines and train, the employer who stands in the relation to them of master and servant, employer and employee, at the time of the injury, shall be liable, without more, to the representatives of the injured person in the liquidated sum of five thousand dollars damages, and no more.

This amounts to an application and extension of the principle of *respondeat superior* to the corporation or individual employer, in all cases of persons dying from an injury of this kind and coming within the purview of the act, by the direct force and operation of the statute itself, independent of the common law rules heretofore governing the liability of the defendant in this class of cases. Of the wisdom, justice or policy of the act we are not to judge; it is enough for us that it is so enacted, and it is our simple and plain duty to declare the law as we find it.

The defence in this case proceeded on the assumption that the statute had made no change in the law as it stood before the passage of the act, in respect of the liability of the defendant to answer in damages for an injury occasioned by the negligence of a servant resulting in the death of a fellow-servant, whilst engaged in the same general employment under the same employer or master, unless it could be shown that the defendant was chargeable with negligence in employing careless and incompetent servants, or in failing to exercise ordinary care and prudence in selecting them. That such was the law prior to the passage of this act, may

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readily be conceded ; it had been so settled in this State by the case of *McDermott v. The Pacific Railroad* (30 Mo. 115) ; a well considered decision, which is sustained by numerous and very learned authorities, both in this country and in England. But in that case, the injured person did not die ; the injury for which the action was brought occurred before the act was passed ; and the suit, which was commenced and decided after the passage of the act, was based wholly upon the liability at common law, independent of statute provision ; and accordingly there is no allusion to this statute, in the opinion of the court in that case. It cannot be considered as an authority on the main questions under discussion here ; and for the same reason, it will be unnecessary to review the other authorities to the same effect which have been cited on behalf of the defendant.

Having thus settled the true construction of the statute, the instructions which were given and refused on either side may be easily disposed of. The first instruction refused for the plaintiff, based his right to recover upon the simple ground of negligence, unskillfulness, or criminal intent, in an officer, servant or employee of the defendant, whilst running and conducting the locomotive which caused the collision, and occasioned the death of the injured person, whose representative brings the suit. It disregards entirely the fact that the injured person was a laborer at wages, and employed on the gravel train as a servant of the company, and a fellow-servant of the employee, against whom negligence in running the engine is charged.

Agreeably to the views above expressed, we are of opinion that this instruction should have been given ; and for the like reasons, all the instructions that were given for the defendant were erroneous, and should have been refused.

The second instruction refused for the plaintiff, was to the effect that if the plaintiff's husband died from injuries resulting from a collision of the locomotive and cars of the defendant, whilst an officer, servant, or employee of defendant, was running, conducting and managing the locomotive

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in question, this is presumptive proof of negligence, and it devolves upon the defendant to show that the company was chargeable with no default. This instruction makes an erroneous application of a principle derived from the law of carriers, which has no proper application beyond that relation, and it was rightly refused. The only authority which has been cited in support of it, has reference exclusively to the law of carriers of passengers. (Pierce's Amer. R. Law, 493.)

Undoubtedly, in the case of a passenger, with reference to whom the defendant stands in the relation of a carrier for hire, bound to exercise the utmost care and diligence, and responsible for the slightest neglect, when an accident and injury are proved resulting from the breaking of carriages or machinery, a want of road-worthiness, or insufficiency of construction, or equipment or other like accidents occurring on the road, the law will imply some degree of negligence from these facts; for, from their very nature they may be taken as affirmatively importing at least that slightest degree of negligence or unskillfulness which will be sufficient to render a carrier liable for an injury done to a passenger. (Ware v. Gay, 11 Pick. 106; Galena & Chicago R.R. Co. v. Harwood, 17 Ill. 509; Laing v. Colder, 8 Barr. 479; 2 Greenl. Ev. § 222.)

But the injured person here was in no proper sense a passenger; he was a hired servant, a day laborer working for wages, and engaged in the ordinary course of his employment and business on the gravel train, at the time of the injury. He paid no fare, but received a compensation for his services in that place, and in that capacity; and by the terms of his contract and the character of the employment, he took the responsibility on himself of all the risks and dangers that ordinarily and necessarily attend such an occupation. Between him and the corporation the relation of carrier and passenger did not at all exist; the proper relation subsisting between them was that of master and servant only; and the liability of the company for an injury done to him, is to be

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determined by the law governing that relation and by the special statute.

The second clause, as we have seen, goes upon this same principle of the law of carriers; and so it declares that when any passenger shall die from an injury resulting from any defect or insufficiency in the railroad, or its engines and trains, the defendant shall be liable without any further proof of negligence; for when the facts are made to appear, the act assumes a *prima facie* case of negligence to be implied. But it is not to be taken as conclusive, nor is the matter of negligence rendered immaterial or unimportant. The burden of proof is merely shifted upon the defendant; for at last, even in the case of a passenger, and much more in the case of an employee or a stranger, the defendant is not to be held responsible in damages for the consequences of unavoidable accident, simple misadventure, or inevitable fate, without any fault or any want of reasonable care, skill and prudence on the part of himself, his officers, agents or servants. Nor is the defendant to be held liable in such case for accident and injuries resulting from the operation of natural and physical causes, not within the control of reasonable care and diligence, any more than for those occasioned by the act of God and public enemies. (*Stokes v. Saltonstall*, 13 Pet. 181.)

The case, then, is to be considered as falling exclusively under the first clause of the statute relating to persons in general. Under the operation of this clause alone, all persons, whether passengers, agents, servants or employees, or mere strangers, are left to stand in the same position and in the same relation to the defendant as if they were all strangers. It has the effect to apply and extend the principle of *respondeat superior* to the principal employer, whether a corporation or an individual, in respect of his officers, agents, servants or employees, and he is made liable for their negligence or unskillfulness, or criminal intent, in the same manner as if it were his own. In all cases which can arise under this clause, the negligence, unskillfulness, or criminal

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intent, necessarily constitutes the gravamen and very gist of the cause of action, and the plaintiff must affirmatively prove all the facts which are necessary to sustain his cause of action and make out a case against the defendant.

The burden of proof rests on the plaintiff. In the absence of affirmative and positive proof of such negligence, unskillfulness or criminal intent, the simple fact of an accident and injury, resulting in death, would rather be attributable presumptively to misadventure, inevitable fate, or other causes for which the defendant would not be liable. There need be no proof in such case of any negligence or want of care and diligence on the part of the employer in selecting his agent and servant, for the act does not rest the liability on any negligence of that kind; though the liability at common law for injuries occasioned by such negligence may still remain as before unaffected by the statute. In all such cases the burden of proof rests wholly on the plaintiff to show negligence by affirmative evidence, and it cannot be presumed from the mere fact that an accident and injury have occurred. Without such proof, the plaintiff will be non-suited. On this point the authorities are numerous and decisive. (Pierce's Am. Law R., 314, 357; Redf. 859; Ang. Carr. § 566; Waldron v. Portland R.R. Co., 35 Me. 422; Batchelder v. Heagen, 18 Me. 32; Lindsay v. Conn. & P. R.R. Co., 27 Vt. 648; Perry v. N. Y. Cent. R.R. Co., 22 Barb. 574; Suydam v. Grand St. & N. R.R. Co., 41 Barb. 375; Haring v. N. Y. & Erie R.R. Co., 13 Barb. 15; Stuart v. Hawley, 22 Barb. 619; Railroad Co. v. Yeiser, 8 Barr. 366; Rood v. N. Y. Cent. R.R. Co., 18 Barb. 85.)

The third instruction refused for the plaintiff, placed the fact of negligence in the employee of defendant correctly enough before the jury as depending upon the consideration whether they exercised the care and foresight of prudent men, and we think it should have been given.

Judgment reversed and cause remanded. The other judges concur.

MECHANICS' BANK, Defendant in Error, v. SAMUEL FOWLER
et al., Plaintiffs in Error.

Practice—Issues—Note.—Where the answer denies any of the material allegations of the petition, and presents an issue of fact, it cannot be stricken out upon motion. An answer, denying the endorsement or assignment of the note to the plaintiff, or alleging that the note was obtained by fraud, and that the plaintiff had notice thereof at the time of taking the note, or alleging that the note had been fraudulently altered after delivery, tenders material issues.

Error to Benton Circuit Court.

F. P. Wright, for defendant.

The court clearly erred in striking out the answer.

I. Plaintiffs only claim of either is the alleged endorsement of Acock, and this averment the answer specifically denies, and also denies that plaintiff is the owner and holder of the note. Plaintiff could not recover without proving the assignment and title to the note. (*Mechanics' Bank v. Donnell*, 35 Mo. 373.)

II. The endorsement being a forgery can found no title, and plaintiff has no right of action; and clearly so, as it was done by an officer of the bank and agent of plaintiffs. An endorsement is a new contract, by which the endorsee acquires title; and this contract being void, no right accrued to plaintiffs. (*Bai. Bills*, 149.) The makers are not liable by reason of a forged endorsement. (*Hall v. Fuller*, 5 Barn. & Cres. 750; *Smith's Merc. L.* 195-6.)

III. A note obtained by fraud and imposition is void between the original parties, in accordance with the dictates of natural justice, recognized in the jurisprudence of every civilized country. (*Sto. Prom. N.* 221, § 188.)

IV. The cutting off the signature of one of the makers of the note was a material alteration, and avoided the note. (*Trigg v. Turner*, 27 Mo. 245; *Sutten v. Turner*, 7 Barn. & Cres. 416.)

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V. The answer denies the averment of excuse for not demanding payment and giving notice; and defendants insist that they are not in default or liable to an action. All this is denied. This part, the answer having been stricken out, the question is properly presented.

WAGNER, Judge, delivered the opinion of the court.

This case must be reversed. The petition states that Fowler and Williams made their negotiable promissory note, payable to the order of B. F. Acock, for the sum of ten thousand seven hundred and thirty-eight dollars eighty-one cents, dated the 5th day of September, 1861, due twelve months after the date thereof, which said note was payable at the branch of the Mechanics' Bank at Warsaw, Missouri. That the said Acock, the payee, by his written endorsement thereon, and for a valuable consideration, sold and delivered the said note to plaintiff. The note was not presented at the bank when it became due and payable, nor was it protested; but there is an averment, that it was impossible on account of the rebellion to have the note presented and protested at that time.

Acock was not served with process. Fowler and Williams appeared and filed their answer.

Their answer alleges that the note was obtained by fraud and imposition; that the assignment was fraudulent and forged, and that the plaintiff took said note with knowledge of these facts. They further allege that, after the making of the said note, it was materially altered, by cutting or tearing off the name of a person who signed as a joint maker with the defendants. They also specifically deny that said Acock by endorsement assigned said note to plaintiffs, or that it was impossible to have had the note protested, when the same became due, on account of the rebellion then existing in the country.

The plaintiff, by her attorney, then filed a motion to strike out said answer, because it stated no legal defence to plaintiff's petition. This motion the court sustained and then

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gave judgment for plaintiff for want of an answer, to which action and decision of the court the defendants excepted.

Defendants then filed their motion to set aside the judgment and grant them a new trial; which being overruled by the court, they excepted, and now bring the case here by writ of error.

It is impossible to sustain the action of the court below in thus summarily disposing of the defendants' answer. They tendered several good and material issues, which if proved as alleged, would have amounted to a complete defence, and on these they were entitled to a trial. Plaintiff's only claim of action is the alleged endorsement of Acock, and this averment is positively and specifically denied in the answer, as also that she is the legal owner of the note; and without proving the assignment and ownership, no recovery can be had. We will not discuss the other issues raised by the answer, as we cannot tell what evidence will be given to support them, or what precise shape they may assume.

Wherefore the judgment is reversed and the cause remanded; the other judges concurring.

RICHARDSON, MELLIER & Co., Respondents, v. W. B. FARMER
AND W. H. JOPES, Appellants.

Partnership—Dormant Partner.—In cases of a dormant partnership, while the credit is given to an ostensible partner because no other is known to the creditor, yet the creditor may also sue the secret partner when discovered, and the credit will not be presumed to have been given on the sole responsibility of the ostensible partner.

Practice—Jeofails.—Although a petition be defective, yet if it appear after verdict that the verdict could not have been given or the judgment rendered without proof of the matter omitted to be stated, the defect will be cured by the statute, and the judgment will not be arrested.

Practice—New Trials—Newly Discovered Evidence.—In a motion for new trial for the reason of newly discovered evidence, the party must show, that by the exercise of due diligence he could not have procured the evidence he failed to produce.

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Appeal from Greene Circuit Court.

At the close of the evidence, the plaintiffs moved the court to instruct the jury as follows :

1. Each acting member of a partnership has an implied authority to execute notes in the partnership name, in payment of any article in which their trade was carried on.

2. Where two or more persons combine their property, labor, or skill, in the transaction of any lawful business for their common profit, such persons are partners.

3. That if they find for plaintiffs, the measure of damages will be the amount of notes sued on, &c.

4. The jury are directed to find for the plaintiffs.

5. A dormant partner is liable, whenever found, for goods purchased and used for the benefit of the firm, and the accepting by plaintiffs of the notes sued upon in payment for a bill of drugs purchased by W. H. Jopes of them, and the acceptance of said notes in payment therefor, if said drugs were used for the partnership of W. H. Jopes & W. B. Farmer, may not be an acceptance of the liability of Jopes alone, or an exclusive credit to him, but was binding upon all for whom Jopes acted.

The defendant Farmer then moved the court to instruct the jury :

1. That if they believe from the evidence that Wm. H. Jopes gave the notes sued on as his own individual notes, and in his own individual name, that he alone will be bound by said notes, even if the jury should also find that the goods for which the notes were given went to the benefit of both Jopes and Farmer. And if the jury believe that the notes were thus given and accepted by plaintiffs as the individual notes of Jopes alone, they will find in favor of defendant Farmer.

2. That the notes being in the name of Jopes alone, is *prima facie* evidence that they are individual notes, and not those of a partnership or firm.

3. That the burden of proof in this case rests on the plaintiffs to establish, that these notes are the contract of a firm and ought to bind them, and not the contract of Jopes alone.

4. That plaintiffs having charged the defendant Farmer with being a co-partner of Jopes, the whole burden of proof lies upon them to prove what they have asserted; and, in addition to that, to prove that Farmer was also a partner of Jopes in the transaction which gave rise to plaintiffs' cause of action.

5. That this suit is brought upon two promissory notes; and if plaintiffs recover, they must do so on these notes, and not upon a liability or contract outside and distinct from these notes.

6. That the main question in the case is, as to whether the notes sued upon are the notes of W. H. Jopes, individually, or the notes of a firm composed of Jopes & Farmer, as a firm doing business under the name and style of W. H. Jopes; and in the determination of this question, you will determine whether there was such a firm or not. If you find there was such a firm, the next question is, as to whether it was, at the time of the execution of the notes sued upon, doing business under the name of W. H. Jopes. If you find there was no such firm, or if you find that it was not doing business under that name, you will find for the defendant.

7. The court further instructs the jury, that if they believe from the evidence that Jopes gave the notes sued upon as his own individual notes, and in his own individual name, that he alone will be bound by said notes; and if the jury believe from the evidence that the notes were thus given and accepted by plaintiffs as the individual notes of Jopes alone, they will find in favor of defendant Farmer.

The court, at the instance of plaintiffs, refused the first instruction asked by defendant, to which refusal defendant excepted. The court then gave the other instructions asked by defendant. The jury then returned a verdict in favor of

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plaintiffs against both defendants, upon which judgment was rendered.

The defendant Farmer then filed his motion for a new trial.

Krum & Decker, with *Lindenbower*, for respondents.

The only exceptions saved which can arise in this court, are upon the failure of the court to give one and the only one instruction refused for the defendant and giving plaintiffs' instructions, and the failure to sustain the motion for a new trial on the alleged ground of newly discovered evidence. Farmer, in his amended answer, denies the existence of any partnership between himself and Jopes; there was no other issue on the trial; the consideration of the notes was not denied.

The evidence tended to prove that the defendants were carrying on the drug business in Springfield, Missouri, under the name of W. H. Jopes; that Farmer was interested in the business from the start, and shared in the profits; and that Farmer advanced in fact the working capital, and finally obtained the proceeds from the sale of these goods; that the goods for which these notes were given, were purchased in the usual course of trade, and formed part of the stock the proceeds of which were finally received by Farmer.

a. The first question raised by the appellant is, whether parol evidence can be introduced to show that the name "William H. Jopes," signed to the notes, was the name of a firm or mercantile partnership composed of the defendants. We know of no law which will prohibit parties from adopting any name as their partnership or firm name; and for this reason it would seem strange that a plaintiff ought to be prohibited from showing that the defendants were partners, and acting under a particular name and bound by such act and name. There can be no doubt that a dormant partner is liable for partnership debts created by verbal contract; why should he be less liable on written contracts,

executed in the name to which he has consented as the partnership name in written contracts?

Although the contract was made only in the name of one partner, and the plaintiff gave credit to only one partner, their joint interest fixes their joint responsibility. (1 Pars. on Cont. 150, and cases cited.)

The cases of notes executed by the agent in his individual name are not applicable, although even in them the tendency of modern decisions is to allow parol evidence in an action against an unknown principal, on an obligation professedly on its face the individual act of the agent. *Smith et al. v. Alexander*, 31 Mo. 193; *McAllister v. Budd*, 33 Mo. 417; *Bay. on Bills*, 501-2, &c.; *South Carolina Bank v. Case*, 8 B. & C., 427; *Sto. Part. &c.*, 139.) It being always, however, necessary in such cases to show that the note was given for partnership purposes.

The difficulty arises only in those cases where the partner in whose name the business of the partnership is transacted has also another and different business on his own responsibility. (*Manuf. Bank v. Winship*, 5 Pick. 11.) In the case at bar there was no pretence that the note was not given for the joint benefit of both, or that Jopes had any business separate from the firm. A case of a liability fixed on a dormant partner, very similar to the case at bar, may be found in *Stephens v. Hampton*, 29 Mo. 264; *Smith on Cont.* 255; *Beckham v. Brake*, 9 Mees. & W. 79; *Winship v. Bank U. S.*, 5 Pet. 530; *Sheehy v. Mandeville*, 6 Cranch, 254.)

b. The court committed no error in overruling the motion for a new trial, based on the alleged newly discovered evidence.

I. The grounds upon which this motion rests are no longer open to doubt. New evidence is so easily manufactured, *ex parte* affidavits so readily obtained, that courts have guarded with the utmost vigilance the attempts to re-open the gates of litigation where they have been once closed by a verdict. Parties are required to use the utmost diligence to prepare their case and evidence made for trial; and the least neglect

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chargeable to them is fatal to a new application. What are the requirements and conditions upon which a new trial may be obtained on account of new evidence? In the case of *Berry v. State*, 10 Geo. R. 511, the rules are aptly stated by the celebrated Justice Lumpkin, and they have been adopted in 3 Grah. & Wat. 1021-2, and also by this court in the case of *State v. McLaughlin*, 27 Mo. 111, as follows:

The applicant must show:

1. That the evidence has come to his knowledge since the trial.

2. That it was not owing to the want of due diligence that it did not come sooner.

3. That it is so material that it would probably produce a different result if the new trial were granted.

4. That it is not cumulative.

5. That the affidavit of the witness himself should be produced or his absence accounted for.

6. That the object of the testimony is not merely to impeach the character or credit of a witness. (*Warren v. Ritter*, 11 Mo. 354; *Boggs v. Lynch*, 22 Mo. 565; 3 Grah. & W., *New Trials*, 1065; *Caldwell v. Dickson*, 29 Mo. 228.)

It is not sufficient for a party to show that he did not know of the evidence, but he must make it appear that he could not have discovered it by using diligence. (*Knox v. Work*, 2 Binn. 582; *Coe v. Given*, 1 Blackf., Ind., 367.) Even in criminal cases this is the rule. (*Laveille v. Harrison*, 30 Mo. 228; *Garner v. Le Beau*, 30 Mo. 229.)

The respondents have not only, during the pendency of this appeal, lost the use of the money to which they were entitled, but have been put to the cost and expense of the employment of counsel to prosecute their claim in this court upon a record which does not even show the shadow of error—but does show that the powers of law have been vexatiously abused by the appellants for the mere purpose of delay. Unless the Supreme Court will frown upon these sham appeals by assessing damages, (which after all is no more than the money is actually worth,) parties for mere

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delay will, and do, find it profitable to appeal upon the most frivolous grounds.

Sherwood & Young, Ewing & Muir, for appellants.

I. The first, fourth and fifth instructions given for plaintiffs are erroneous.

II. The first instruction asked on behalf of Farmer should have been given. (Sto. Part. § 134; *Sylvester v. Smith*, 9 Mass. 115; *Loray, Beard & Co. v. Johnson*, 2 Pet. 186; *Loyd et al. v. Freshfield et al.*, 2 Carr. & Payne, 325.)

III. The instructions given are inconsistent and contradictory, and were calculated to mislead the jury.

IV. The motion for a new trial should have been sustained. It showed a good defence, the exercise of all diligence, and a manifest surprise on the part of appellant.

The motion, and the affidavit in support of it, are in all respects sufficient. (2 R. C. 1855, p. 1285, § 2 & 3; 27 Mo. 111; 22 Mo. 563; 15 Mo. 319-20.)

The petition is defective in not averring the existence of any partnership between Jopes and Farmer.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought in the Greene county Circuit Court, by the respondents against the appellants. The petition is founded on two notes, and contains two counts. In the title to the cause, Jopes and Farmer are declared to be partners in trade, doing business under the firm name of W. H. Jopes. The first count then avers that defendants executed the note in their firm name, in payment for a bill of drugs and medicines bought by them of plaintiffs and used in their business. The second count is the same as the first, except that it is alleged, that the defendants executed the note sued on in their firm name of W. H. Jopes.

Jopes did not appear to the action. Farmer filed his answer denying the existence of the partnership under the name and style of W. H. Jopes, or under any other name or style, and averring that the notes sued on were the separate

and individual notes of the said Jopes, and executed for his sole use and benefit. A jury was empannelled to try the issue, and at the instance of the plaintiffs the court gave several instructions, the fifth and last of which is as follows :

“A dormant partner is liable, whenever found, for goods purchased and used for the benefit of the firm, and the accepting by plaintiffs of the notes sued upon in payment for a bill of drugs purchased by W. H. Jopes of them, and the acceptance of said note in payment therefor, if said drugs were used for the partnership benefit of W. H. Jopes and W. B. Farmer, may not be an acceptance of the liability of W. H. Jopes alone, or an exclusive credit to him, but was binding upon all for whom W. H. Jopes acted.” To the giving of all of said instructions the defendants at the time excepted.

Defendants then asked the court to give several instructions in their behalf, all of which were given except the first ; and to the decision of the court in refusing to give said first instruction they also excepted.

The jury found a verdict for plaintiffs, and defendants made their motion in arrest of judgment and also a motion for a new trial, both of which motions were overruled by the court and defendants duly excepted, and Farmer now prosecutes his appeal in this court.

1. The instructions given for the plaintiffs below, respondents here, taken together, fairly presented the law to the jury ; the first instruction asked by defendants, which the court refused, whilst enumerating a correct abstract principle of law, is not applicable to this case ; the other instructions prayed for, and which were given, were of the most favorable character. The great mistake made in the line of argument pursued by the appellants' counsel is not paying proper regard to the obvious distinction between partnerships, where all the members are open and notorious, and those where some are silent or dormant. Parties have a right to make their own contracts to assume extraordinary liabilities, or to take inferior securities when they might have

insisted on greater ones. When they are fully cognizant of all the facts, and a specific credit given, or a personal liability incurred, the law will not attempt to interfere and set up a new agreement for them, but will leave them to abide by their own engagement. The maxim *modus et conventio vincunt legem* then fitly applies.

The case of *Sylvester v. Smith*, 9 Mass. 115, merely decides that where an agreement was entered into between two persons, one to find the stock and the other to do the labor, and the profits were to be divided among them equally, an action might be maintained against the person buying the stock, notwithstanding the other person who was to perform the labor was not joined with him; Judge Parker saying, that, "notwithstanding a co-partnership, either of the co-partners may undoubtedly contract on his own account, and make himself liable for merchandise bought for the co-partnership account, if the vendor chooses to accept him. In *Loyd v. Freshfield*, 2 Carr. & Payne, 325, Abbott, Ch. J., held, that if money be lent to one partner on his individual credit, the fact that it is applied in discharge of the liabilities of the firm will not enable the lender to sue the firm for its repayment. In *Le Roy v. Johnson*, 2 Peters, 186, Hoffman and Johnson were co-partners in trade; a bill of exchange was drawn by Hoffman after the dissolution of his partnership with Johnson, and the proceeds of the bill went to pay and did pay the partnership debts of Hoffman and Johnson, which Hoffman on the dissolution of the firm had assumed to pay; it was decided by the court that the holder of the bill, after its dishonor, could have no claim on Johnson in consequence of the particular appropriation of the proceeds of the bill. It was admitted that if one partner contract with a third person in the name of the firm after the dissolution, but the fact of such dissolution not being made public or known to such third person, the law would consider the contract as being made with the firm and on their credit. But when the partner made an agreement or entered into a contract with another in his individual name,

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and upon his sole personal responsibility, it was of no importance for the other to know that the partnership was dissolved; because he was dealing, not with the firm and upon their credit, but with the individual with whom he was acting, upon his own credit.

It will be perceived that in all the foregoing cases the partnerships were known; their existence brought home to the knowledge of the parties dealing with them. They were placed in a situation to exercise their right of election, and were unquestionably bound by their own deliberate acts. They were not deprived of the right of choosing their debtors, and there is no hardship or injustice in holding them to their choice. But in the case of a dormant or secret partner, while the credit is manifestly given to the ostensible partner because no other is known to the party, yet the credit is not deemed to be exclusive, the creditor having had no opportunity to elect or choose his debtor.

The credit will not, therefore, be presumed to have been given on the sole and separate responsibility of the ostensible partner, but will bind all for whom the partner acts, if done in their business and for their benefit. (Sto. on Part., § 138; 1 Sto. on Cont., § 226; *Thompson v. Davenport*, 9 Barn. & Co. 78; *Bracken v. March*, 4 Mo. 74; *Raimond v. C. & E. Mills* 2 Metc. 319; *Bank v. Birney*, 5 Mason, 176; *Winship v. Bank U. S.*, 5 Pet. 529.)

2. The motion in arrest of judgment brings up the question of the legal sufficiency of the petition. It is contended by the appellants' counsel that the petition is fatally defective, because there is no express averment that Farmer and Jopes were co-partners, and as such executed the notes by the name and style, &c., of W. H. Jopes. In the title the partnership is well set out, but in the body of the petition it is only charged that they made and executed the notes sued on in their firm name, and we have now to decide whether this defective and insufficient allegation is cured by verdict. The rule in reference to this subject is believed to be well settled, but the authorities differ in its application.

In *Stephens v. Frampton*, no partnership was alleged in the petition; the defendant answered denying the partnership and also the execution of the note; the court below having found for the plaintiff, this court affirmed the judgment, saying that the defendant was not aggrieved by the omission. (29 Mo. 263.)

It is said in the court of King's Bench: "Where matter is so essentially necessary to be proved, that, had it not been given in evidence, the jury could not have given such a verdict, then the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must, in fair construction, so far require to be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed, after verdict, that it was so restrained at the trial." And Mr. Sergeant Williams says: "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict." And this rule has been well established and followed by our own adjudications. (*Jackson v. Pesker*, 1 M. & S. 234; 1 Saund. 228, n. 1; *Frost v. Pryor*, 7 Mo. 314; *Palmer v. Hunter*, 8 Mo. 512; *Shaler v. Van Wormer*, 83 Mo. 886; *Addington v. Allen*, 11 Wend. 374; *Grey v. James*, 1 Pet. C. C. 476; *Bayard v. Malcolm*, 2 Johns. 550; 2 R. C. 1855, p. 1255, § 19.)

And now in the case here, though the petition was obviously defective, the whole matter was submitted to the jury under proper instructions from the court; without proof of partnership they could not have found their verdicts; they

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were the rightful triers of the fact, and we do not feel disposed to disturb their findings.

3. The appellant, in his motion for a new trial, states that since the trial he had discovered new testimony materially affecting his rights, and tending to diminish the amount, which respondent ought to recover, several hundred dollars. In support of this motion, he made an affidavit stating in substance that at the time of the execution of the notes sued on, W. H. Jopes was indebted to respondents in the sum of \$1,841.42, and that being so indebted he gave his notes for that sum, but by mistake at that time gave his other note for half that sum, to-wit, \$920.72; that he was never advised of the mistake, and could not discover it by any possible diligence, and never discovered it till after the trial had ended. To further support this, Jopes, who was also called as a witness, made his affidavit corroborating the statement of the appellant Farmer, and alleging that he was totally ignorant of his being sued on two notes till he was called on the witness stand. Does this application disclose such facts as will entitle a party to a new trial? Is the requisite diligence here exhibited? The partners were joint defendants and sued as co-partners; they were regularly served with process; they had ample time, and it was their business to consult together and advise each other of every thing that was necessary and essential in their defence.

When a person receives notice of trial, he is at once put on enquiry. The period of notice is always sufficiently ahead of the sitting of the court, to afford parties full opportunity to ascertain the precise situation of their cause, and what testimony they will require on their trial. And courts will not aid parties where they have failed to take the requisite steps to procure their evidence, and more especially where they have been guilty of unpardonable neglect. Before they ask the courts to help them, they must have evinced a disposition to help themselves.

To interpose in this case and grant a new trial, would be setting a precedent that would unsettle well established prin-

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ciples, lead to great abuse and interminable litigation. If a hardship in this case is worked to the parties, it is justly imputable to their own laches.

We see no error in the court in overruling the motion. The judgment is affirmed. The other judges concur.

JAMES HARKNESS, ADM'R OF JOHN N. DYSART, Respondent,
v. GREEN AUSTIN *et al.*, Appellants.

Practice—Error—Irregularity.—Where the plaintiff in the suit dies, the administrator can be substituted in his place only by the voluntary appearance of the defendant, or by the service upon him of a *scire facias*. To enter the appearance of the administrator and give judgment against defendant without such appearance or *scire facias*, is erroneous.

Practice—Irregularity—Limitations.—The party has three years within which to move to set aside a judgment for irregularity.

Appeal from Greene Common Pleas Court.

John S. Phelps, for appellants.

Irregularity is the want of adherence to some prescribed rule or mode of proceeding, and consists in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner. (34 Mo. 318.)

The proceedings to obtain the judgment in the name of Harkness, administrator of Dysart, against Austin & King, were irregular. The order substituting Harkness, Adm'r, &c., as plaintiff, was not made on the voluntary appearance of the adverse original party, or after the service of process on him. (R. C. 1277, § 33; 18 Mo. 480; 19 Mo. 33; 20 Mo. 464.)

WAGNER, Judge, delivered the opinion of the court.

It appears from the record in this cause, that one Dysart commenced his suit in the probate and Common Pleas Court of Greene county, returnable to the May term, 1861, at

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which time appellant filed his answer and the cause was continued.

At the November term, 1862, the death of Dysart was suggested, and the court made an order reviving the suit in the name of Harkness, administrator, and permitting his name to be substituted on the record as plaintiff, and then gave judgment. The appellant did not appear in court at that term. At the May term, 1865, of said court, appellant appeared and filed his motion to set aside the judgment on the ground that it was irregular, which was by the court overruled. Section 33 of the Practice Act, R. C. 1855, p. 1277, provides that "All orders made for the purpose of substituting any person as plaintiff or defendant, in place of the original defendant or plaintiff, shall be made either upon the voluntary appearance of the adverse original party, or after the service upon such party of a summons, as hereinbefore described." A party may always be substituted by motion in accordance with the above section, but it must be done on the voluntary appearance of the adverse original party. If he does not so appear, then he must be brought in by summons in the manner prescribed by law.

The record here shows there was no appearance, and no steps taken to bring the party into court in a legal form. As the law does not precisely define the manner in which the opposite party is to be brought in when a substitution is made, this court has decided that it must be done by *scire facias*, according to the sixteenth section of the Practice Act of 1845, which still remains unrepealed. (Ferris v. Hunt, 18 Mo. 480; Fine v. Gray, 19 Mo. 33.) The statute (R. C. 1855, p. 1290, § 26) gives a party three years in which to move to set aside a judgment for irregularity rendered in a court of record. The motion was in time, and the judgment being manifestly irregular, ought to have been sustained.

The other judges concurring, the judgment will be reversed and the cause remanded.

STATE *ex rel.* WILLIAM WERKMAN, Petitioner, *v.* WILLIAM
BISHOP, State Treasurer, Respondent.

Union Military Bonds.—By the act of February 10, 1865, (Sess. Acts 1865, p. 56, § 81,) and the ordinance of the Convention of April 8, 1865, § 28, an appropriation was made for the payment of Union Military bonds and of the Missouri Militia, in the first class. By the act of February 15, 1865, (Sess. Acts 1865, p. 61,) the bonds were properly presented to the Auditor, to compute the principal and interest due, and draw his warrant upon the Treasurer for the payment of the bonds presented for redemption.

Petition for Mandamus.

Ewing, Smith, and Krum & Decker, for petitioner.

I. That under the statutes regulating the duties of the offices of the Treasury department, the Treasurer cannot refuse to pay any warrant drawn upon an appropriation or fund existing, unless there is some defect apparent on the warrant. In other words, the Auditor is the officer charged with auditing, adjusting and settling all claims against the State; and it is the duty of the Treasurer to disburse the money on such warrant drawn according to law.

He has no power to control the Auditor; he has no power to re-audit, re-adjust and unsettle the warrants. The means to investigate all claims are given alone to the Auditor. If the Treasurer wilfully fails to pay a warrant lawfully drawn, he is liable to the holder for four times the amount of the warrant. (Treasury, ch. II., R. C. 1855.)

II. That the fund (Union Military fund) upon which the warrant is drawn is sufficiently certain; it is unnecessary to state in the body of the warrant for what particular service it is drawn. This is according to the established custom of the office of the Treasury.

III. That the Union Military fund created under the act of March 9, 1865, and regulated under the subsequent acts of the Legislature, is pledged to the redemption of the Union Military bonds, and afterwards for the arrears due the

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Enrolled militia, and cannot be controlled for the purpose of organizing, equipping, subsisting or paying the Missouri militia, which is a separate organization.

That the ordinance of the Convention under which this power to subvert this fund is supposed to exist, has expressly provided that the General Assembly shall hereafter make provisions for the pay of said militia.

That no money can be drawn upon the Treasury except upon appropriations made by law, and there is not anywhere any appropriation made for the benefit of this new militia. That the old Enrolled militia for which provision has been made, after the redemption of the bonds, is entitled to be paid out of said fund.

IV. The act affirmatively provides that all bonds to be redeemed shall be redeemed by warrants drawn by the Auditor, and thereby overrides the prior statute. That the statute of March 9, 1863, creating these bonds, making them payable at the office of the Treasury, is not inconsistent with the statute of Feb. 15, 1865, which provides that the Auditor shall draw his warrant therefor. In order to draw his warrant for the bond, the bond must be left at his office. This act relating to the drawing of warrants for the Union Military bonds, thus provides an entirely new mode of redemption, which is inconsistent with the plan heretofore adopted.

V. The Constitution and laws of the State provide that no warrant shall be drawn except after an appropriation made by law, and that every warrant shall specify the fund out of which it is payable. From this it follows that the officer charged with the duty of drawing the warrant, is directed to make the warrant payable out of some existing fund; and it must be for expenses for the payment of which some appropriation has been heretofore made by law. Where there is no appropriation, the Auditor gives his certificate, and this certificate comes before the next General Assembly. (R. C. 1855.)

Under this we contend that no appropriation has been made to pay out any money from the Treasury to the Mis-

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souri militia, created by the act of Feb. 15, 1865, and by the ordinance of State Convention.

VI. A brief examination of the statutes will show that the General Assembly never contemplated the expenditure of the Union Military fund for the militia. The act of 1863 creates this fund, and provides that the Enrolled Missouri militia shall be paid by bonds, there being no appropriation in that act for the money of the Treasury. The fund is created and pledged to the redemption of the bonds after they are paid out to the militia.

The first section act of 1863 provides that the bonds shall be payable at the office of the Treasurer. The act of 1863—4 (adjourned) provides for the redemption of bonds at their face only; and the only object of the last act was a temporary one, and expired when the bonds matured by its own limitation. It was a bid by the State to induce bondholders to accept less than the whole amount to which they would be ultimately entitled, by offering to pay them before maturity. But the act of 1863, § 1, provides that a new mode of redemption shall be employed *by warrant* of the Auditor. By the third section of same act, all provisions of prior acts inconsistent with this last act are repealed.

There is now no mode of redeeming bonds with interest except upon a warrant of the Auditor. The Auditor can only draw this warrant when there is money in the Treasury; the Auditor is made the judge of the question. He is to compute the interest, and therefore they must be presented to him. There is no law or reason to require that they shall first be presented to the Treasurer. The public notice applies only to redemption of bonds redeemed without interest.

It would be strange, indeed, if the State should, in addition to the full payment of bonds and interest, be required to notify her creditors to receive their money.

(For brief of R. F. Wingate, for respondent, see *State ex rel. H. W. Long, Petitioner, v. Wm. Bishop, State Treasurer.*)

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HOLMES, Judge, delivered the opinion of the court.

William Werkman, the relator, was the holder of certain Union Military bonds, issued in pursuance of the act of the General Assembly, approved March 9, 1863, (Laws of 1863, p. 25,) which, on the 6th day of July, 1865, he presented to the State Auditor for computation of interest under the act of February 15, 1865. (Laws of 1865, p. 61.) The Auditor made the computation and drew his warrant of that date for the amount of the bonds presented, payable to the relator or bearer out of the Union Military fund, with a memorandum at the bottom, as follows: "P. \$21, I. 2.20=\$23.20;" and the relator went to the office of the State Treasurer, respondent, with the bonds and the warrant, which he presented to the Treasurer and requested payment thereof. The Treasurer refused payment, and by way of justification alleges in his return to the alternative writ of mandamus. that the warrant was not drawn as the law requires; that there was a large sum still due the militia of the State for services actually rendered prior to the adoption of the ordinance of the late State Convention, and that until the indebtedness of the State to the militia is fully discharged, the Union Military fund cannot be applied to any other purpose; that the relator should have presented his bonds at the Treasury for redemption before taking them to the Auditor; and further, that the bonds were not entitled to redemption, except in pursuance of notice to be given by the Treasurer as provided in the act of Dec. 19, 1863. (Laws of 1863-4, p. 15.)

By the first section of the act to provide "for the payment and support of the Enrolled militia," (Laws of 1863, p. 26,) the Union Military bonds thereby authorized to be issued were made payable and redeemable at the office of the Treasurer in Jefferson City, and, by the seventh section of the act, "all bonds redeemed, together with interest thereon, would be charged to the account of the Union Military fund," and cancelled; and when cancelled, carefully filed and preserved in the office of the Treasurer: and by a joint reso-

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lution of the General Assembly, approved February 18, 1864, (Laws of 1863-4, p. 102,) the Governor was authorized to appoint a committee from time to time, to count and destroy the Union Military bonds so redeemed and in the hands or possession of the Treasurer. These bonds were to be issued in sums of one, three, five, ten and twenty dollars, printed in the usual manner of bank notes, and in the form of warrants, payable to bearer at the office of the Treasurer out of the Union Military fund, countersigned by the Auditor and signed by the Secretary of State. The same act created a Union Military fund which was pledged for the payment of these bonds, and was to be set apart by the Treasurer for that purpose only, and paid out under its provisions. By the act of December 19, 1863, (Laws of 1863-4, p. 15,) the Treasurer was authorized to place on deposit at the Bank of the State of Missouri at St. Louis, any money in the Treasury to the credit of this fund, to be used in the redemption of these bonds at their face; and he was required to give notice of the time and place of such redemption, specifying the class of bonds that would be redeemed, and to take up the same in the order of the date of their issue, to be cancelled as before. The thirty-first section of the act "for the organization and government of the Missouri militia," approved February 10, 1865, (Laws of 1865, p. 56,) was substantially, and indeed almost literally, reenacted in the late Convention ordinance of the 8th of April, 1865; and it provides that the proceeds of certain taxes therein authorized to be levied, should be paid into the Treasury to the credit of this same Union Military fund, and that out of such fund should be paid, first, "All sums now due the Enrolled Missouri militia for services rendered, and Union Military bonds now outstanding or hereafter issued; and, second, all expenses incurred according to law and audited by the proper officers, and appropriations for military purposes, as other claims against the State." (Ord. of Conv. of 1865, § 23.)

The objections of the Treasurer (respondent) to the pay-

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ment of the bonds presented in this case resolve themselves substantially into these two, that the warrant was not "drawn upon the Treasury according to law (R. C. p. 1547), and that it was not drawn upon a fund "previously appropriated by law" for that purpose, and to be paid in that manner. (Rev. Stat. 1855, p. 1545; Laws of 1863-4, p. 15.)

On a general view of these acts, it is apparent that they were intended to create a peculiar class of demands against the State, and indeed a kind of money not exactly of the character of a circulating medium, but bonds in the form of bank notes, and in the shape of warrants drawn by the Auditor upon the Treasurer of the State, and they are made redeemable and payable at his office; and, at the same time, a special fund is created and set apart in the Treasury for the express purpose of redeeming these bonds. It has been contended that the bonds are merely demands against the State, and that, like all other demands upon the Treasury, they should be presented to the Auditor for examination, allowance, and designation of the particular fund appropriated by law for the payment of them; and that the Treasurer had no further duty, when a warrant was presented to him for payment, than to see that it was drawn in proper form, and upon some fund of his office which had been appropriated by law for the payment of demands of that nature.

This would seem to be a nearly correct statement of their respective duties and functions in general; but we have here a series of special statutes which must be interpreted by themselves, and the subject must be governed by the peculiar provisions of these acts. And as well from the nature and form of these bonds, and the reason of the thing, as by the literal terms of the act, it is plain that they were not to be paid as ordinary demands against the State, but directly by the Treasurer at his office. When paid, he is expressly required by the act to cancel them, and carefully to file and preserve them in his office. And a further provision is made by the joint resolution of the General Assembly, for a committee to be appointed by the Governor to see them finally

destroyed, the Treasurer receiving a voucher and a credit for them. They bore interest, and when redeemed the interest also had to be computed and paid by the Treasurer; but the paid bonds would be none the less a sufficient voucher in his hands, on that account, for both principal and interest.

So the matter stood until the passage of the act of February 15, 1865, (Laws of 1865, p. 61,) which provided that the Auditor should compute and allow the interest on the bonds whenever presented for redemption, and should draw his warrant for the amount of the bonds presented and interest, when there should be a sufficient amount of money in the fund available for their redemption.

It has been argued on the one side that it belongs to the Auditor under this act to determine when there is money available in the fund and when a warrant should be drawn; and on the other, that this matter could be adequately known only to the Treasurer, and therefore, that, in accordance with the express words of the former act, the bonds were still to be first presented for redemption to him at his office, in order that he might determine the question of a sufficiency of funds, before the bonds should be taken to the Auditor for a computation of interest and a warrant. We think this dispute to be more a matter of form than substance. Undoubtedly, the bonds are to be redeemed and paid at the office of the Treasurer; but before that can be done, they must be taken to the Auditor for a computation of the interest, and a warrant must be drawn for the amount of principal and interest, which the Treasurer is to pay. The bonds remain in the hands of the holder until paid; the Auditor will take a receipt and keep an account of his warrants; and the bonds and the warrant must be delivered up to the Treasurer when paid. This is a sufficient presentation for redemption, and we see no useful object or purpose to be answered by requiring any other presentation to the Treasurer.

It is further objected that these bonds can only be re-

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deemed in pursuance of the notice and other provisions of the act of December 19, 1863. A very slight attention to the scope of that act is enough to make it clear that all its provisions on this subject relate exclusively to the particular deposit therein required to be made at the Bank of the State of Missouri, of the moneys then in the Treasury to the credit of this fund, or thereafter to be paid in, to be used in the redemption of Union Military bonds at their face; that is, we may suppose, without interest. But admitting that the Treasurer has power under that act to dispose of the funds in that way, if he is able to do so, it by no means follows that such is the only way in which the bonds can be redeemed and paid; the other laws still remain in force, and the redemption may go on at the Treasury as before, when there is money to answer the demands that are made. The respondent does not answer that he has no funds.

A further objection is, that a large sum is still due the militia for services rendered prior to the ordinance of the late Convention, and that the militia are entitled to priority of payment and of this fund; and this pretension appears to be founded in part upon the last clause of section twenty-three of the ordinance of April 8, 1865, in these words: "and second, all expenses incurred according to law and audited by the proper officers, and appropriations for military purposes, as other claims against the State."

First, it may be observed, that a slight correction of the punctuation would add much to the perspicuity of this clause, and help to make its meaning clear. Omit the comma after "officers," and include the words "incurred according to law and audited by the proper officers," in a parenthesis, and it will be seen at once that the true meaning is, that all expenses and appropriations for military purposes (duly audited) are to be paid out of this fund, secondly in order of priority, as other claims against the State are audited, allowed and paid. But first, in order of priority, are to be paid "all sums now due the Enrolled Missouri militia for services rendered and Union Military bonds now outstanding

or hereafter issued." Here nothing can be plainer than that the Enrolled militia who have not been paid, and Union military bonds which have been issued for the express purpose of paying that meritorious class of the public creditors, stand together in the first class in the order of priority, but without preference as between them, and that they are to be fully paid out of this fund, which was created for their especial benefit, before any part of it can be applied to the second class of claims; namely, expenses and appropriations for military purposes in general, which are to be audited and allowed and paid as other claims against the State, but out of the balance, if any remaining, of this special fund.

We are satisfied that such is the true meaning and intent both of the ordinance of the Convention and the act of February 10, 1865. It results from this view, that here was a fund duly appropriated by law and set apart in the Treasury for the purpose of redeeming these bonds and paying such warrants of the Auditor as should be drawn according to law for that object and upon that fund.

It only remains to consider whether the warrant in this instance was drawn in due form of law. That it was drawn by authority of law, has already been shown. And for the master of form, we do not see but that it contains every essential requisite of a valid warrant in such case. It names the holder of the bonds presented as the payee; it is drawn for the total sum of principal and interest due on those bonds, with the several amounts of each noted separately; and it is drawn payable out of the Union Military fund, and presented to the Treasurer in company with the bonds themselves. There can scarcely be room for doubt that this was sufficient to inform the Treasurer on which particular fund the warrant was drawn, and the purpose for which it was drawn, so as to enable him to judge and know whether or not a fund of that kind had been duly appropriated by law for the payment of demands and warrants of that nature; and this was enough for him to know. Neither can there be any doubt that this warrant and the bonds, if they had

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been paid by the Treasurer when so presented, would have been an ample voucher for his protection in a settlement of accounts.

We are of opinion that the warrant should have been paid, and accordingly the peremptory mandamus will be ordered. The other judges concur.



STATE *ex rel.* H. W. LONG, Petitioner, v. WILLIAM BISHOP,
State Treasurer, Respondent.

Union Military Fund—Revenue.—The act of the General Assembly (Sess. Acts 1863, p. 27, § 9) appropriates all the moneys collected under the act to the payment and redemption of the bonds issued under the act. The expenses of assessing and collecting the tax are not to be paid out of the moneys collected for this fund.

Petition for Mandamus.

Ewing & Smith, for petitioner.

I. Although this is ostensibly a controversy between the Assessor of Cole County and the Treasurer of the State, yet it is really a controversy between two co-ordinate branches of the Executive departments of the State Government, the Auditor and Treasurer.

The question or matter of difference between these two officials is, whether the Auditor is authorized by law or reason in drawing his warrants on the Treasurer for compensation due assessors of the several counties for making assessments under an act of the General Assembly, approved February 20, 1865, (Sess. Acts 1865, p. 112,) providing for the assessment and collection of an additional tax on incomes, &c. This special tax is, by the provisions of the above named act, to be paid into what is termed the "Union Military fund." This is an independent and separate fund created for specific purposes. (Sess. Acts 1863, p. 27, § 9.)

Out of what fund should the expenses incurred in the as-

assessment of this "Union Military fund" be paid? The natural and reasonable presumption is, that such expenses should be paid out of said fund. Ought it not to pay its own way? How is it with other funds? The Revenue, School, Asylum, and other funds, pay all the expenses incurred in their management. What provision of the law directs the payment of the expenses of this fund to be different from others? There is no such law. By analogy it would seem this fund should pay its own way.

Section 31 of the Militia law, approved February 20, 1865, (Sess. Acts 1865, p. 56,) provides that "all taxes levied and collected for military purposes, all fines imposed * * * and all other appropriations and levies made for the benefit of the militia, shall be paid into the State Treasury to the credit of the 'Union Military fund.' Out of such fund shall first all sums due the Enrolled militia, Union Military bonds, and expenses incurred according to law," &c. This section is strangely inserted in the Militia law. It should manifestly belong to the Revenue law. It is retained in the ordinance of the late Convention making another Militia law. It is still the law of the land. Herein we gather something of the intendment of the law-makers. It is plain from this section, that the expenses incurred in collecting, &c., of this fund, is to be paid out of the same.

This assessment was made to increase the Union Military fund—to add thereto—by the provisions of the said act to levy taxes on incomes. Inasmuch as the act under which Long made his assessments is silent as to the fund out of which he shall receive his compensation, still there can be no reason why he should not be paid out of this fund, as is provided in said sec. 31. There is nothing that we can find either in the law, or analogy to other funds, that does not authorize the Auditor in drawing his warrant on the Union Military fund for expenses incurred in its assessments.

What is the necessity for an appropriation? If an appropriation be necessary, why is it that the collectors, in their settlement for the collection for the Union Military fund,

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have always been paid out of the same fund without any appropriation?

Wingate, for respondent.

As to warrants the Treasurer may not pay.—The Treasurer cannot pay a warrant not drawn as required by law. (See 2d s. d. § 1, p. 1547, R. C. 1855.)

If a warrant is drawn, and it be a departure from the form, in sense or purpose, prescribed by the R. C. 1855, sec. 14 & 15, p. 1545, it is a warrant not drawn as required by law, and the Treasurer cannot pay the same.

If a warrant is drawn, and it is *not* expressed in the body of the warrant the particular fund, appropriated by law, out of which the same is to be paid, the warrant is not drawn as required by law, and the Treasurer cannot pay the same. (See 3d s. d. of sec. 4, p. 1540, R. C. 1855.)

If the Auditor draws his warrant upon the Treasury to be paid out of moneys paid into the Treasury for a specific purpose, for which purpose the Treasurer is required to keep the same separate and apart; and if it is *not* expressed in the body of the warrant that the money to be paid on the same is for the specific purpose for which the same was set apart in the hands of the Treasurer, he cannot pay the same; as, for instance, the Treasurer is bound by law to keep all moneys paid into the Treasury to the credit of the Union Military fund sacred for certain specific purposes.

Now, if a warrant drawn by the Auditor on this fund does not show upon its face that it is for one of the specific purposes for which the Treasurer is required to set money in this fund apart, he, the Treasurer, cannot pay the same. This must be, and is so, for the reason that the money of the fund cannot be paid out for any other purposes than those for which the same was created; and for the reason also, that the law imposes upon him the obligation of keeping money paid into the Treasury for the purposes for which the same was paid into the Treasury, in this instance, whether for the payment of the sums now due the Enrolled Missouri

militia, or for the pay of Union Military bonds. (See sec. 9, pp. 27 & 28, Laws of 1863, and sec. 23 of ordinance of the Convention of 1865.)

As far, then, as it is necessary to enable the Treasurer to ascertain whether a warrant is drawn as required by law; whether it contains in the body of the warrant a statement of the particular fund appropriated by law, out of which the same is to be paid; whether the money for which the warrant is drawn has been previously appropriated by law; and whether, if the warrant is drawn for money belonging to and set apart by law for a specific purpose, it is specified in the warrant that the warrant is drawn for the specific purpose,—it is the duty of the Treasurer to examine the warrant, and question the act of the Auditor in drawing the same.—These are the legal requisites of a warrant, and if the warrant of the Auditor does not possess them, the Treasurer cannot pay it; otherwise the language of the second subdivision of sec. 1, p. 1547, R. C., can have no meaning. It is the duty of the Treasurer to know that a warrant, presented to him for payment, has been drawn in strict conformity with all the laws pointing out the requisites of a warrant before he pays the same.

If the Treasurer is the keeper of certain moneys for a specific purpose, must not a warrant for those moneys show upon its face that it is a warrant for those moneys for that purpose? If the warrant of petitioner herein is deficient in that it has not one or more of the requisites above named, the Treasurer cannot pay it.

Of what moneys the Union Military fund shall consist.—Sec. 9, pp. 27 & 28, at first provided, but sec. 23 of Militia ordinance of the Convention, passed April 8, 1865, now provides, as also "Additional Revenue Tax," p. 112, Laws of 1865.

For what specific purposes the Military fund was created.—Sec. 9, p. 28, Laws of 1863, first provided, but sec. 23 of Military ordinance of the Convention of 1865 now provides.

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The law authorizing the issue of Union Military bonds (of 1863), sec. 1, p. 26, Laws of 1863; where payable, *ibid.*; when payable, *ibid.*; what payable out of, sec. 9, p. 28, *id.*; which Union Military fund is pledged to the payment of these bonds alone, except as the ordinance of the Convention (sec. 23 of Militia law, passed April 8, 1865) modifies said sec. 9, p. 28, Laws of 1863.

By whom and in what manner paid, on presentation to the officer at whose office they are payable, secs. 1 & 7, pp. 26 & 27, Laws of 1863; Law "to enhance value of Union Military bonds," p. 15, Laws of 1863 & 1864; and "concerning redemption of Union Military bonds," p. 61, Laws of 1865. This last mentioned act should be construed in connection with and amendatory of the "Act (p. 15 of Laws of 1863 & 1864) to enhance value of Union Military bonds."

By whom cancelled, sec. 7, p. 27, Laws of 1863; and destroyed, joint resolution, p. 102, Laws of 1863 & 1864.

LOVELACE, Judge, delivered the opinion of the court.

The petition states that the relator, under the provisions of an act of the General Assembly of the State of Missouri entitled "An act to levy additional State taxes for the years 1865 and 1866," and the instructions of the Auditor of Public Accounts made in pursuance of said act, made an assessment of the county of Cole, and duly returned a book of the same to the County Court of Cole county, and that the compensation therefor allowed by law amounts to two hundred and eighty-four and $\frac{2}{3}$ dollars, and that the Auditor audited said account and drew his warrant for the same as follows: "No. 1085. Auditor's Office, 21st day of June, 1865. Treasurer of the State of Missouri, pay to H. W. Long, Assessor Cole county, two hundred eighty-four and $\frac{2}{3}$ dollars, out of any money appropriated for the pay of the Union Military fund, for expenses incurred according to law. (Signed) A. Thompson, Auditor. \$284.20." That on the 3d day of July, 1865, the relator presented said warrant to the re-

spondent at his office in Jefferson City, Missouri, and demanded payment, which was refused ; and the petition closes with a prayer that a peremptory writ of mandamus issue against said respondent commanding him to pay the amount due on said warrant.

The answer of respondent assigns among other reasons for not paying the warrant, the following : That there is no law authorizing or requiring the respondent, as State Treasurer, to pay said warrant out of the Union Military fund.

Many other objections are urged in the answer to the warrant in question, but they are all embraced in his statement above given.

In the act of the Legislature creating this fund, (Acts of 1863, p. 27, § 9,) after providing how this fund should be created and of what moneys it shall consist, it is enacted that "this fund shall be and is pledged for the payment and redemption of all the bonds, principal and interest, which may be issued under this act, (and shall be set apart by the Treasurer for that purpose only,) and shall be paid out under its provisions." This would seem a solemn appropriation of the whole of this fund for the sole and only purpose of redeeming the Military bonds issued under the provisions of that act, and would of necessity exclude the payment of any other claims or expenses.

In 1865 the Legislature passed an act in relation to the militia, which contained some sections bearing upon this fund ; but in a few weeks afterwards that act was abrogated by the State Convention and "An ordinance for the organization and government of the Missouri militia" was passed in its stead. By the 23d section of this ordinance it is provided that "out of such fund (the Military fund) shall be paid first, all sums now due the Enrolled Missouri militia for services rendered and Union Military bonds now outstanding or hereafter to be issued ; and second, all expenses incurred according to law and audited by the proper officers, and appropriations for military purposes as other claims

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against the State. I do not know that it is claimed that this warrant is to be paid under the provisions of the Convention ordinance as "expenses incurred according to law;" if it were so contended, it would be a sufficient answer that these expenses are put in the second class, and a large amount of bonds still unpaid are outstanding which belong to the first class, and must be paid before the second class is reached.

But the ground contended for by the relator is, that the services rendered were in behalf of the Union Military fund, and that each fund ought to pay its own expenses. This depends very much upon whether the Legislature has so provided. In this case the Legislature has expressly provided otherwise; as we have already seen, the Legislature, by the act of 1863, appropriated this fund exclusively to the redemption of Union Military bonds, and the ordinance of the Convention does not disturb this in the least, for it provides that these bonds shall be first paid out of this fund. But not only that, but there is an appropriation or fund set apart by the Legislature for the payment of the very expenses mentioned in this warrant—the appropriation for the expenses of assessing and collecting the revenue. (Sess. Acts 1865, p. 5.) Even if the assessment had been exclusively for the benefit of this fund (which it was not), still I apprehend it would be included in assessing the revenue. It would hardly be contended that the "Military fund" is not composed of revenue; and if it is, the expenses of assessing and collecting of it ought to be paid out of the general appropriation for assessing and collecting the revenue.

A peremptory mandamus cannot issue in this case commanding the Treasurer to pay the warrant out of the Military fund.

Mandamus refused; the other judges concurring.

State ex rel. Secretary of State v. State Auditor.

STATE *ex rel.* FRANCIS RODMAN, Secretary of State, *v.* A. THOMPSON, State Auditor.

Secretary—Militia.—By the act of February 28, 1865, (Sess. Acts 1865, p. 59,) the Secretary of State was to be paid for his services under the act, out of any moneys in the Treasury not otherwise appropriated, and not out of the fund created by the act.

Petition for Mandamus.

LOVELACE, Judge, delivered the opinion of the court.

This is a petition for a mandamus on the respondent as Auditor of Public Accounts, to require him to draw his warrant in favor of the relator for the amount due him for services as Secretary of State, under the provisions of an act of the Legislature, approved February 20, 1865, entitled "An act for the payment of arrears due the Enrolled militia for services actually rendered to the State." The first and second sections of the act (Sess. Acts 1865, p. 59) provide for issuing Union Military bonds for the payment of the militia; and the third section is in these words, "Said bonds shall be in the form of those provided in the aforesaid act of March 9, 1863, except that February, 1865, shall be inserted instead of March, 1863, and shall each be numbered and registered on the day of the date thereof in the Auditor's office, and when so registered, shall be countersigned by the Auditor and signed by the Secretary of State, who are hereby authorized to cause the same to be done by the chief clerks, if necessary to expedite the issue of said bonds; and the said Secretary and Auditor shall be entitled to a reasonable compensation for the duties required of them by this act, not to exceed four hundred dollars. Their account to be approved by the Governor and paid out of any money in the Treasury not otherwise appropriated."

The respondent answers that he has drawn a warrant on the Union Military fund for the benefit of the relator. In the case of the State *ex rel.* Long v. Bishop, Treasurer,

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decided at this term of the court, it was held, that this Union Military fund had been appropriated by the Legislature for the purpose of redeeming Union Military bonds; and expenses incurred about its collection were not properly payable out of that fund. That doctrine applied here would cut the relator out from any benefit in said fund for his services in this matter.

But in this case, as in Long's, there is an appropriation for the payment of this very indebtedness. The Legislature appropriated four hundred dollars to be paid out of any money in the Treasury not otherwise appropriated for the especial benefit of the relator.

But it is argued that there is no money in the Treasury not appropriated to some other purpose. If that is true, it is the misfortune of the relator. The Legislature can only make appropriations; if the money is not in the Treasury the presumption is that it will come in. It is certainly no objection to the appropriation that it is made of moneys not heretofore appropriated. The Legislature would not desire to appropriate money twice; and in this particular, it is precisely like the general appropriation bill passed at the same session of the Legislature (p. 5). The appropriations there mentioned are also to be paid out of any money not otherwise appropriated. The Auditor ought to issue his warrant on the fund appropriated for that purpose: and to compel him to do so the mandamus will issue; the other judges concurring.



STATE *el rel.* R. F. WINGATE, Att'y General, *v.* A. THOMPSON, State Auditor.

Salary—Attorney General.—The act of the General Assembly of February 18, 1865, (Sess. Acts 1865, p. 124,) increasing the salary of the Attorney General, took effect from its passage and was entirely prospective in its operation. It did not retrospectively increase the salary from the commencement of the quarter of that year.

State ex. rel. Attorney General v. State Auditor.

Petition for Mandamus.

To the petition of relator the Auditor made the following return :

The facts stated in the petition of Robert F. Wingate, Attorney General, are admitted in so far as that said Robert F. Wingate, Attorney General, did present an account to the State Auditor for fifteen hundred dollars, for salary as Attorney General from January 1, 1865, to June 30, 1865, being for two quarters, which account was not allowed in full by me, the State Auditor, for the reasons following :

1. The salary of the Attorney General was by law fixed at the rate of \$1,500 (fifteen hundred dollars) per annum, and was the lawful rate at the time when the present incumbent, said R. F. Wingate, entered upon his office and qualified, to-wit, on January the 8th, 1865. (Laws 1856-7, p. 175-6.)

2. The salary of said Attorney General was raised to the sum of three thousand dollars (\$3,000) annually by the act of February 15, 1865, which said act (Laws 1865, p. 124) ends in these words: "This act to take effect and be in force from and after its passage," and therefore did take effect from and after February 15, 1865, but not prior to said day.

3. If the last clause of said act, here above cited, had not been attached to said acts, the provisions of said act would have taken effect ninety days after its passage. (2 R. C. p. 1022, § 2.)

An instance illustrative of this point is the act of February 16, 1865, (Laws 1865, p. 122,) in favor of the chaplain and physician of the Penitentiary, which act took effect, and the increased rate of their respective salaries began, ninety days after the passage of the act, to-wit, on May 16, 1865.

4. Whenever an act intends that the salary of an officer shall be paid, at the increased rate or otherwise, for any time prior to the passage of the act, then the language in the body of the act specifies the time from which the salary shall

be paid at the rate established by the act. This is done, for instance, in the act fixing the salary of the *ex-officio* Superintendent of Common Schools, approved February 10, 1864, (Laws 1864, p. 103,) which act specifies that the salary shall commence on March 23, 1863. And the act of February 13, 1864, raising the salary of the then Treasurer, G. C. Bingham, (Laws 1864, p. 109), specifies that the increase of salary shall take effect from October 1, 1863. No provision of a similar nature is contained in the act of February 15, 1865, relating to the salary of the petitioner, said R. F. Wingate, as Attorney General.

5. The words "annual" and "per annum" have reference only to the rate at which the salary is to be computed and paid; they do not necessarily mean that the salary shall commence from the first day of January, and certainly not in this instance of the case of the petitioner. If he, or any other officer, did not receive a commission and qualify until, for instance, February 15, 1865, although such officer by law might have taken possession of his office on the first day of January, then he surely could not claim payment for the time prior to February 18, 1865, merely because his annual salary was to be a certain sum.

By an act of February 18, 1865, (Laws of 1865, p. 121,) it is provided that "the judges of the Circuit Courts shall receive two thousand dollars annually. The several circuit attorneys four hundred dollars annually." No circuit judge nor circuit attorney has claimed, under the provisions of this act, the increased salary for any services prior to the date of the act, to-wit, February 18, 1865.

It would then seem that the present judiciary of the State of Missouri was unanimous in sustaining the interpretation given by the State Auditor to the clause, "This act to take effect from and after its passage."

6. The Supreme Court of the State of Missouri has established a precedent to the point. The salaries of the judges of this court were increased from \$2,500 to \$3,000 per annum; by the act of January 16, 1860, (Laws of

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1860, p. 90,) the Chief Justice, Hon. Wm. Scott, drew his quarter's salary on April 2, 1860, and instructed Mr. Morrison (then State Treasurer) as follows: "You will please see when the new law went into effect, and make out the account accordingly"—(his letter is on file in the Auditor's office); and he drew his salary as stated on the voucher (on file in the Auditor's office) from January 1st to January 15, at \$2,500, \$103.02; from January 16 to March 31, at \$3,000, \$626.38—making \$729.40. The Hon. E. B. Ewing, another of the judges of the Supreme Court, presented his account in person, on April 2, 1860, in the same words and figures; so did the third judge, the Hon. W. B. Napton; all of which vouchers are on file in my office, and have been examined in preparing this my answer; and have been examined, approved and passed upon by the legislative committees controlling the Auditor's office.

7. By the act of February 27, 1857, (Laws of 1857, p. 175-6,) the "annual salary of the Attorney General" was raised from \$800 to \$1,500. The incumbent of the office at the time presented his account on April 2, 1857, in these figures: "From January 1 to February 26, at \$800, \$126.06; from February 27 to March 31, at \$1,500, \$137.50; which voucher is on file in my office, and the above is a true copy of it," &c.

WAGNER, Judge, delivered the opinion of the court.

Prior to the 15th day of February, 1865, the salary of the Attorney General of this State was fixed by law at fifteen hundred dollars per annum. By an act approved on the said 15th day of February, it was raised to the sum of three thousand dollars, which said act by its terms was in force and took effect from and after its passage. (Laws 1865, p. 124.) It is contended that by virtue of the words "annual salary," therein used, the increased salary should commence on the first of January preceding, being the beginning of the quarter of that year.

There is no just or reasonable rule of interpretation

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which will warrant such a conclusion. By our general law, acts take effect ninety days after their approval, unless a different time be designated in the act itself. The Legislature in this instance fixed the time at which the law should go into force, and it will not be presumed that they meant any other or different time. There is no room left here for construction; there is neither ambiguity nor obscurity in the act. It will always be intended that the law-making power use words in their usual and proper signification; hence courts will not deviate from the common usage of the words, unless it is made clearly to appear that they were intended in a different sense, or there be good and substantial reasons for affixing a different meaning to them. The language employed in the act is clear and explicit, and to make it relate back and cover the previous period, before it took effect, would be to violate and torture the ordinary meaning of words. Had the Legislature intended that the increased salary should commence from the beginning of the year, they would have said so when fixing the period at which time the act should go into operation. As they did not see fit and proper to do so, there is no warrant for giving it a different meaning than that expressed therein.

The relator is entitled to salary at the rate of fifteen hundred dollars annually, till the 15th day of February, 1865, and at the rate of three thousand dollars thereafter.

With the concurrence of the other judges, the mandamus is refused.



STATE *ex rel.* ALBERT JACKSON, *v.* A. THOMPSON, State Auditor.

Mandamus—Office.—State *ex rel.* Jackson v. Auditor, &c., (84 Mo. 375,) affirmed.

Petition for Mandamus.

Ewing & Muir, for relator.

The relator applies for a mandamus, now, under circum-

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stances totally different from those in which he made application to this court against a former Auditor. (Jackson v. Auditor, 34 Mo. 375.) There is now, no contest for the office of Judge of the 15th Judicial Circuit, and consequently no question of "right to an office," as between contesting claimants, to be determined, that being the ground upon which the application was *then* refused. The relators only remedy now, it is submitted, is by mandamus.

I. The act of 1855 (Sess. Acts of 1855, p. 24) is valid, except so far as it undertakes to limit the tenure of the office of judge. This clause is merely a void provision or condition engrafted upon a valid act. (Const. Amend., R. C. 1855, pp. 94-5; *id.* p. 77; People *ex rel.* Ingersoll v. Gray, 6 Cow. 646; Bausle v. Wilson, 4 Tex. 410; Bruce v. Fox, 1 Dana, 453; 7 How., Miss., 552.)

If there is no express limitation in the Constitution as to the power of the Legislature in the creation of judicial circuits and the fixing the time for holding elections therein, the act in question in these particulars is valid, unless the exercise of this power is clearly repugnant to, or inconsistent with, some express promise of the Constitution.

II. The petitioner was duly elected in 1857, and if duly elected, it was for the full term of six years, commencing from the expiration of the first term in 1861. (1 R. C. 1855, p. 532, and authorities before cited.)

III. The amendments of the Constitution in 1862 only changed the *time* of holding the election for judges from August to November. But the Legislature has enacted no law to give effect to the amendment of the Constitution in this respect. As to the effect of such omission, see State v. Ewing, 17 Mo. 515.

IV. The practical construction by the legislative department of the provisions of the Constitution, on this subject, fully accords with the foregoing views, as shown in the several acts establishing judicial circuits and fixing a time for the election of judges therein. (Acts 1858-9, pp. 27, 32-4; 1 R. C. 1855, p. 552, § 42.)

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V. It is submitted that there is nothing in the mere fact, that the election of the petitioner in 1857 was held some three years before the expiration of his first term. This is the case with many of the offices filled by election—members of Congress, for example, who are elected in November, and do not enter upon their duties until December of the year following.

VI. The Constitution nowhere says all the judges of Circuit Courts shall be elected at the same time; and to give such a construction to the clause providing for the first general election in August, 1851, and on the first Monday in August every six years thereafter, is to qualify the other clauses referred to improperly, and to restrict the power of the Legislature under them within narrower limits than their terms and the object in view would warrant. Taking the several provisions on this subject together, the reasonable construction seems to be, that, as to the circuit judges then in office, only the clause providing for a general election should apply; and that the Legislature, under the ample power elsewhere given, (there being no limit as to the number of judges,) might, when the public good required, establish new circuits and provide for the election of judges therein. It is very remarkable, if it had been intended that the judges, to be elected in the circuits thereafter established, should be chosen at the same time with those then in office, it was not so expressed in the simple declaration—that all circuit judges should be elected at the same time.

WAGNER, Judge, delivered the opinion of the court.

This case is the same as the one reported in 34 Mo., between the same parties, except that the petitioner now claims the additional salary that has accrued since the institution of the proceedings thereon. The question involved is the same. A *mandamus* will not be issued to admit a person to an office while another is in under color of right. The election of Emerson as Judge of the 15th Judicial Circuit is admitted: he was regularly commissioned, and held his office under

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said election as judge. The register in the office of the Secretary of State showed Emerson to be the judge; and the Auditor, in auditing and allowing the salary, is governed by the register. A conflict of title to the office is then presented, and that cannot be determined by *mandamus*; it must be by a direct proceeding in the nature of a *quo warranto*.

The distinguished counsel for the petitioner has assumed, that, because the office has since been vacated by act of Convention, no question as to title can arise with the incumbent Emerson, and, therefore, *mandamus* is the only remedy; but this is begging the question. If Emerson was legally in as judge, then the petitioner is not entitled to the compensation he seeks; and this involves a determination of who was the legal and rightful occupant of the said office, which we hold cannot be passed upon in this action.

Judge Lovelace concurring, the application for a *mandamus* is refused; Judge Holmes not sitting.



STATE TO THE USE OF MILDRED E. TAYLOR, Plaintiff in Error,
v. JAMES H. WOODS *et als.*, Defendants in Error.

Administration—Partnership—Bond.—The creditor of a partnership under process of administration cannot sue upon the bond of a surviving partner unless he present his demand to the surviving partner to be classified within two years, or have the same allowed against the estate of the deceased partner. Unless the claim be thus presented, the partnership estate will belong to those who do establish their claims, and all others will be cut out from its benefit. (R. C. 1865, p. 125, § 68.)

Error to the Saline Circuit Court.

Samuel Boyd, for plaintiff in error.

The law does not require that a demand against a partnership estate administered by a surviving partner should be allowed against such estate by the county court; nor is such allowance necessary in order to maintain an action on

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the bond of such surviving partner. (*Bredell v. Baldwin*, 27 Mo. 106.)

The supervisory control which a county court has over a surviving partner administering a partnership estate is statutory merely; no authority of the kind was exercised over him at common law by courts of equity. He, being the owner of one half the partnership property, was of right entitled to the possession and control of the whole, and was, in the disposition of it, subject to the same rules of law, and bound to the performance of the same duties, as the partnership firm prior to the decease of one of the firm; he was still bound to seek and hunt up claims against the partnership and pay them off, and this must still be the law unless changed by the statute expressly. There is no change of the statute which can be construed to change this law even by implication.

The 62d section of the 1st article of the statute concerning administration—which says, “where the surviving partner refuses to pay,” &c.—does not repeal it. The term “refuse,” as used by the statute, does not contemplate a mere neglect or failure to pay, but must mean a denial of the legal obligation of such survivor to pay such demand, and must be considered rather as an exception to a general rule than as a general rule itself. So far as the allowance of such claims is concerned, the law does not regard a surviving partner as in the same position as an ordinary administrator. In ordinary cases the administrator is a stranger, and cannot be presumed to know who are or who are not legal creditors of the estate, or to have any knowledge of the business affairs of his intestate. Hence, for his protection against fraud and imposition, as well as for the protection of the estate, the law has given to courts of equity jurisdiction a supervisory control over the administrator and estate, and has enacted that all claims against such estate must be presented and proven to the satisfaction of the court, after notice to the administrator.

But the reasons for such a proceeding cannot exist in the

case of a surviving partner. He, having been a party in all the business transactions of the firm, and the owner of a moiety of the partnership property, and responsible for the debts of the partnership, must, on the contrary, be presumed to have a complete knowledge of the partnership affairs, and the intervention of a court of equity for his protection is unnecessary.

Again, the allowance of such a demand by a probate court is no remedy for the creditor. A probate court cannot make an order for the surviving partner for the payment of the debt until after an apportionment is made; no apportionment can be made without a settlement; and the power of the probate court to compel such survivor to settle is not sufficient, because such court has not, as in cases of ordinary administrators, the power to remove him. (*Green v. Virnden*, 22 Mo. 506.)

In ordinary cases of administration, the right of action on the bond only accrues after a settlement, apportionment and order of payment by the county court, or after removal for failure to settle; so that the power of the county court to give a remedy upon the bond of a surviving partner is insufficient from the absence of the power to remove.

Again, the surviving partner, or his securities, in an action against them on the bond, have the right to set up any defence to the action which the surviving partner himself might set up, in an action against him upon the demand, made the foundation for the action for damages on the bond. The plaintiff in such action must show the damages, and, in order to do this, must show the legality of the demand upon which the claim for damages is founded. It is a matter of evidence, and the surviving partner and his securities have the right to defend against it. The bond of a surviving partner is given as a mere security for the application of the partnership property to the payment of the partnership debts; and upon a failure of such surviving partner to comply with the conditions of such bond, the right of action accrues, for the benefit of the creditor.

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Ewing & Muir, for defendants in error.

The demurrer was properly sustained. There is no breach of the bond alleged whereby it appears that the plaintiff Taylor is injured, or showing any liability on the part of defendants to her. The petition does not state that the plaintiff's demand has been allowed by the probate court, nor does it show by any averment that any order of court has been made for its payment, or that it has ever been in any way legally established, or that any assets have ever come to the hands of Woods which ought to have been or could be lawfully applied to its payment. (State to use of Cowan v. Modrell et al. 15 Mo. 424.)

The surviving partner, it is true, has the power to pay off demands against the partnership effects without requiring the same to be exhibited for allowance to the county court; but if he refuse to thus pay them voluntarily, they shall be exhibited to the county court for allowance and classification. (R. C. 1855, § 62, p. 124-5.) But there is no averment showing either a refusal to pay by the surviving partner, or an allowance by the court. Had these averments been made, the petition would still be defective in omitting to show that either an order of court for the payment of this demand, or that assets came to the hands of the surviving partner which were applicable to plaintiff's demand.

For aught that appears in the petition, all the assets received by the surviving partner have been exhausted in the payment of other claims. (R. C. 1855, § 62 & 63, p. 124-5.)

The petition is also defective in praying judgment for the balance of the note and interest instead of the penalty of the bond. (State v. Ruggles, 20 Mo. 100-1.)

LOVELACE, Judge, delivered the opinion of the court.

This case having been disposed of on demurrer in the court below, the question to be determined is whether the plaintiff states sufficient facts in her petition to constitute a cause of action. The petition shows the execution of a promissory note for one hundred and thirty-one dollars and

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twenty-five cents, by J. H. & W. C. Woods, a firm composed of James H. Woods and William C. Woods; that said note was executed sometime in the year 1860, and was payable on or before the 25th day of December, 1860, with interest from maturity at the rate of ten per cent. per annum; that there was a credit of five dollars endorsed upon said note on the 1st day of May, 1861, and afterwards on the — day of —, there was paid the further sum of thirty dollars; that the balance of the note and interest remains due and unpaid; that in the year 1861 William C. Woods departed this life, and James H. Woods as surviving partner undertook to settle up the estate of the partnership, and, in pursuance of the fifty-fifth section of the first article of the statute respecting executors and administrators, he, as principal, together with the other defendants, as securities, executed a bond to the State of Missouri, conditioned that if the said James H. Woods (of the late firm of J. H. & W. C. Woods) should use due diligence and fidelity in closing up the affairs of the late firm or copartnership, apply the property thereof toward the payment of the late partnership debts, render an account annually to the probate court of Saline county of all the partnership affairs, including the property owned by the late firm and the debts due thereto, as well what may have been paid by the survivor towards the partnership debts as well as what may be still due and owing therefor, and pay over within two years (unless longer time be granted by the probate court) to the executor or administrator the excess, if any there be, beyond satisfying the partnership debts and costs and expenses in closing affairs of the copartnership,—then said bond to be void.

Plaintiff then avers that James H. Woods, as surviving partner, took possession of a large amount of goods; chattels and personal property belonging to said partnership estate, to wit, goods, chattels and personal property to the amount of six thousand dollars; but that said James H. Woods entirely failed to use diligence and fidelity in closing the affairs

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of the late partnership ; that he failed to apply the property of said partnership to the payment of the partnership debts ; that he failed to render an account annually upon oath to the probate court of Saline county, and that he entirely failed to comply with the conditions of said bond ; and, by reason of the said failures to comply with the conditions, the said bond has become forfeit, and defendants have become liable to pay all damages which have accrued to any persons by reason of said failures ; and that Mildred E. Taylor has been damaged by reason of said failures to the amount of the balance due on her said note and the interest thereon, for which amount the plaintiff asks judgment.

To this petition defendants demurred for the reasons—1. The petition does not show that said Mildred E. Taylor has been damaged by the alleged breaches of said bond. 2. The petition does not show that plaintiff, to the use of Mildred E. Taylor, has any right of action against defendants. 3. It does not appear from the petition that the alleged demands of said Mildred E. Taylor have been allowed against said partnership estate, or in any way legally established against said estate. 4. It does not appear from the petition that said Mildred E. Taylor is entitled to have any portion of the assets of said partnership estate applied to the payment of her claim. 5. The petition does not show any legally established right of said Mildred E. Taylor in the assets of said partnership estate, and the assignment of the breaches of said bond is not sufficient.

The demurrer was sustained by the Circuit Court and judgment entered up against the plaintiff, and the case is brought here by writ of error.

It is certainly difficult to see how the breaches assigned in the petition can affect Mildred E. Taylor. It is entirely possible for every assignment of breaches to be true without any damage whatever resulting to Mildred E. Taylor. It may be that the estate was not administered with diligence and fidelity ; that the property was not properly applied to the payment of debts ; that accounts were not properly and

annually rendered; in short, every act complained of may have been done without in the least affecting the payment of the promissory note belonging to Mildred E. Taylor.

To entitle the plaintiff to recover on this bond, it was necessary to show some specific breach by which she was specially damaged. The breach complained of—that the defendant James H. Woods had failed to apply the property of the partnership to the payment of the partnership debts—can result in no injury to the plaintiff until she first puts herself in a condition to receive the partnership estate.

But it is said that these debts against partnership estates need not be allowed by the probate court, but may be paid by the surviving partner without an allowance. That is true if the surviving partner will pay them without an allowance. But suppose he refuses to pay; then the statute expressly provides that they shall be exhibited to the county court for allowance and classification. (R. C. 1855, p. 125, § 62.) The surviving partner and his securities are only liable upon this bond when the surviving partner has failed to apply the partnership funds to the payment of the partnership debts. What are the partnership debts to which this fund must be applied? Evidently the debts that are recognized as such by the surviving partner and those that have been allowed by the probate court.

The 63d section of the 1st article of the administration act provides that “all demands presented for allowance or payment against the partnership effects within the first year of the grant of administration thereon shall be placed in the first class, and all other demands presented or paid within two years after such grant shall be placed in the second class, and all demands not presented or paid within such two years shall be forever barred against the partnership effects administered.” There is no allegation that this claim was ever presented to the survivor for payment, or to the probate court for allowance. Suppose claims enough had been presented during the first and second years to have consumed the partnership estate, and the survivor had fail-

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ed, as alleged, to apply the partnership effects to the payment of the partnership debts; this claimant would not have suffered by it, for the partnership estate would then have belonged wholly to claimants who had presented their claims. She would have still had, as she has now, her right of action against the estate of the deceased partner, and also against the surviving partner; but no right of action against the partnership effects, and consequently no right of action against the securities on the official bond of the surviving partner.

To establish a cause of action on the official bond of the surviving partner, it is necessary that the plaintiff's claim should be classified under the statute so as to give an interest in the partnership estate, otherwise the partnership estate will belong to those who do establish their claims, and all others will be cut out from its benefit. And in this case the plaintiff's petition fails to show any interest that she has in the partnership effects.

The other judges concurring, the judgment is affirmed.



STATE OF MISSOURI, Respondent, v. JAMES HAYS, Appellant.

Criminal Practice—Variance.—An indictment charging the defendant with selling intoxicating liquors to A., is not sustained by proof of selling to other persons. The allegations and the proofs must correspond in criminal as well as in civil cases.

Appeal from Greene Circuit Court.

Wingate, for plaintiff.

This was an indictment under the 4th and 10th sections of the "Act to prevent the adulteration of spirituous liquors," approved March 28, 1861. (Sess. Acts 1860-1, p. 92.) The indictment is founded on the 4th section, the penalty is provided under the 10th. The evidence tends to show the com-

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mission of the offence against which the 4th section is intended to guard.

I. It is contended that it was unnecessary to charge in the indictment that the defendant sold liquors to any particular person by name, or to prove any particular person by name. The indictment is good without such allegation. (*People v. Adams*, 17 Wend. 475, and cases cited.)

The refusal of the defendant's first instruction was proper. By the 27th sec., art. 4, Prac. Crim. Cas., (2 R. C. 1855, p. 1176,) it is provided, "that no indictment shall be deemed invalid, nor shall the trial or judgment be stayed, arrested or in any manner affected by reason of any surplusage, where there is sufficient matter alleged to indicate the crime and person charged," &c. The name of the person to whom liquor was sold was surplusage, and the omission to prove it is therefore unimportant; but the giving of the instruction as asked would have made this surplusage a material allegation before the jury, and therefore it was correctly refused.

II. There was no error in refusing the second instruction; because it implied that the burden of proof was on the State to show that the defendant did not take the oath, and had not given the bond required by statute. No principle is better established in criminal as well as in civil law, that the burden of the proof of a negative is never imposed on the plaintiff when the defendant has it peculiarly in his power to prove the affirmative. The State had made a *prima facie* case by proving the sale of the liquor, and it was incumbent on defendant to show that he had taken the oath and given bond. In the absence of such proof, a conviction was proper.

III. The failure of the defendant to object or except to the giving of the instructions by the court, prevents this court from any examination of the same even if they were erroneous.

But it is insisted that the instructions given were proper and according to the act under which the indictment was found.

IV. The evidence clearly showed the defendant guilty of

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selling liquor in Greene county within a year preceding the finding of the indictment. Dealing out liquor behind the bar, and waiting on customers, is "selling liquors," in common parlance. So the witness meant; so the jury found.

James F. Hayden, for defendant.

I. The court erred in refusing the instructions asked by defendant. (*Gardner v. The State*, 14 Mo. 97.)

II. The court erred in giving the instructions asked by the State. (*State v. Matthews*, 20 Mo. 55; 30 Mo. 201.)

III. It is a settled doctrine that the testimony in a criminal offence must prove the offence as charged, or some less grade of the same character of offence, such as the law would authorize the jury to find defendant guilty of under the indictment.

HOLMES, Judge, delivered the opinion of the court.

The defendant was indicted at the July term, 1864, of the Circuit Court of the county of Greene for unlawfully selling spirituous liquors to one John McElhaney without having taken the oath and filed the bond required by the act of March 28, 1861, (Sess. Acts of 1860-61, p. 92,) and pleaded not guilty.

The only evidence offered on the trial was the testimony of John McElhaney, to the effect that he was acquainted with the defendant and had drunk frequently at the grocery called "Hays & Gorman's," but that he never bought any liquor of Hays in his life, though he had once seen him behind the counter waiting on customers.

The instructions which were given for the plaintiff proceeded on the idea that the naming of John McElhaney might be rejected as surplusage, there being no evidence of any sale to him, and that a verdict might be found against the defendant on the evidence tending to show a selling to other persons.

Two instructions were asked for by the defendant which the court refused, the defendant excepting to the effect that

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unless the jury believed from the evidence that the defendant, within one year before the finding of the indictment, sold spirituous liquors to John McElhaney without having filed the oath and given the bond required by the statute, as charged in the indictment, they would find for the defendant.

The jury rendered a verdict of guilty and fixed the fine at fifty dollars, and the defendant moved for a new trial on the ground of error in giving and refusing instructions.

It was contended on the part of the State, that it was unnecessary to charge in the indictment that the defendant sold liquors to any particular persons by name, or to prove a selling to any particular person by name; and we are referred to the "Act concerning Criminal Practice," (R. C. 1855, p. 1176, § 27,) where it is provided that no indictment shall be deemed invalid, nor shall the judgment be affected, "by reason of any surplusage, where there is sufficient matter alleged to indicate the crime and the person charged."

The offence charged and described in this indictment consists in selling liquors to John McElhaney only; it contains no averment of any sale to other persons by name or otherwise. The name of John McElhaney is thus made to enter into the description and substance of the offence charged; and it is a rule, equally applicable in criminal as in civil cases, that the substance of the issue must be proved. (3 Greenl. Ev. § 23.) The name and person of John McElhaney cannot be rejected as surplusage or as immaterial, for the reason that no charge would remain of a selling to anybody, without an averment of a selling to some person or persons, known or unknown, by name or otherwise. The indictment would be clearly bad. It has been held by this court, that an indictment for selling liquor as a dram-shop keeper without license must show to whom the liquor was sold. (Neale v. The State, 10 Mo. 498.) And there must be such a degree of certainty in the description of the offence as that the defendant may not be indicted for one thing and tried for another. (Barb. Cr. Law, 332.) There was some evi-

dence from which selling to other persons, the customers of the defendant, not named, might possibly be inferred; but this was not charged in the indictment.

In the case of *The People v. Adams* (17 Wend. 475), cited by the Attorney General for the State, the indictment charged that spirituous liquors were sold without license to "divers citizens" and to "divers persons unknown;" and it was held that the designation of the persons by name was altogether immaterial, and that proof of a sale to one individual would sustain the indictment and authorize a conviction; and still further, that it was no variance between the offence as laid and the one proved—that there was no proof of a sale to the "persons unknown." In this case the unknown persons being rejected as surplusage, enough still remained in the indictment to cover the charge as proved; and this may be taken as precisely what is intended by the section referred to in the "Act concerning Criminal Practice." It cannot be interpreted as effecting any change in the well settled rule of the common law, applicable as well to criminal as to civil cases, that the allegations and the proofs must correspond; and, accordingly, it was decided in *The State v. Shoemaker*, (7 Mo. 177,) that although, under an indictment for the first degree of an offence, a conviction might be had for an inferior degree of the same, on proofs falling short of the first degree, but showing the defendant guilty of such inferior degree, yet there must be, in such case, a count in the indictment containing a sufficient description of the offence so proved; but if, on the contrary, it be so totally dissimilar as not to come within the description of the charge contained in the indictment, the variance will be fatal. Here, the charge as laid was not proved, and the offence that was proved was not charged.

We are of opinion that the instructions for the defendant, which were refused, should have been given.

Judgment reversed. The other judges concur.

Lamy et al. v. Burr, Garn.

ERNEST LAMY AND JACOB MCFADDEN, Defendants in Error,
v. WILLIAM E. BURR, GARNISHEE OF BRAND, Plaintiff in
Error.

Conveyances—Power of Attorney.—A. gave to B. a power of attorney to transact all his business, to collect all moneys due him, and to sell all his property real and personal; B., under the power, conveyed by deed of trust to C., as trustee, all the property and assets of A. in trust to secure and pay off the creditors and sureties of A. *Held*, that the power was properly executed, and that C. took a good title to the property.

Error to Cooper Circuit Court.

Muir & Draffen, for defendants in error.

I. The judgment of the Circuit Court was correct, for the reason that the property mentioned and described in the garnishee's answer was subject to this attachment. The deed of trust, under and by virtue of which the garnishee claimed said property, was and is void; it was made by an agent under a letter of attorney, and confers no power upon said agent to convey said property in trust for the payment of the principal's debts. The power of attorney authorized a sale, but, we think, a sale in the usual sense of that term, and not a sale upon conditions; and, in construing the power, the intention of the party giving it should govern. (*Bank of Mo. v. McKnight*, 2 Mo. t. p. 38; 1 Am. Lea. Ca. 560-1; *Sto. on Ag.* § 1, p. 65.)

But suppose it be admitted that the power of attorney in this case did authorize the agent Wilson to convey the property in question in trust; is there anything in the power that would authorize the trustee to pay the debts of Brand? We think the agent Wilson himself could not have legally done so; and if he could, will it be contended that his substitute could?

As Wilson was simply an agent for Brand, with authority to do certain acts mentioned in the power of attorney, what right had Wilson, under the power, to substitute Burr the

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garnishee? Wilson was the person appointed by Brand, and not Burr. Wilson, then, being Brand's agent, he could not delegate his authority. (Sto. on Ag. § 13, p. 14.)

Adams, for plaintiff in error.

I. The only question presented by this record is whether the power of attorney from Brand to Wilson authorized the execution of the deed of trust to Burr. In construing a power of attorney, we look primarily at the language, and then to the attendant circumstances and the purpose intended to be accomplished. In this case, the large and comprehensive terms of this power of attorney to Wilson undoubtedly includes the power to make a deed of trust, unless there be something in the surrounding circumstances which clearly excludes such an idea. So far from that being the case, the pleadings admit that the main object and purpose of the power was the application of Brand's property to the payment of his debts; that he himself was not in a condition to attend to it, and therefore, in appointing his attorney, he conferred upon him full power to transact all his business, and full power to dispose of all his property. He intended to invest, and by the language of the power of attorney did invest Wilson with supreme power over all his business. But the main business to be transacted was the application of his property to the payment of his debts; how could this be so well done, and so equitable to the creditors, as by a deed of trust which would distribute the proceeds ratably amongst them? It is said that a simple power to sell does not comprehend the power to mortgage; but this is not a simple power to sell property, but, in connection with that, are the most ample and comprehensive powers to settle and transact *all* of Brand's business. Under this power, is there any doubt that Wilson, in settling Brand's affairs, would execute promissory notes in Brand's name? Would not Brand, beyond all question, be bound by such notes? and if Wilson could do this, could he not also execute mortgages to secure the payment of such notes? (Bank of Mo. v. McKnight, 2

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Mo. 42; Taylor v. Labeaume, 14 Mo. 572; Taylor v. Bennett, 17 Mo. 838; Sto. on Ag. § 126.)

II. The principle that an agent cannot delegate his powers is not involved in this case. The Circuit Court based its opinion on this ground, that it has no bearing whatever upon the case. There is no pretence that Wilson delegated, or attempted to delegate, his power. By the execution of the deed of trust his power ceases; it was a *functus officio*. The power of sale in the mortgage to Burr was not a delegated power from Wilson. The deed to Burr carried the whole legal title, and the power to sell was a mere trust created for the purpose of enabling him to foreclose the mortgage without resorting to the courts for that purpose. Such a power is exercised by the trustee in his own name as owner of the property, and not as agent for the original owner. If Wilson had power to make a simple mortgage, he surely had power to make a mortgage with power of sale. If the mortgage to Burr without the power of sale would have been good, such power could not invalidate it, and therefore, in any view of the case, the property conveyed to Burr was not subject to this garnishment.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff sued one Horace H. Brand in attachment in the Cooper Circuit Court and recovered judgment, and Burr was summoned as garnishee. In the spring of 1861 Brand joined the rebel army under Gen. Sterling Price, and left his home in Cooper county in this State. In July in said year, whilst in Newton county in this State, he made and executed a power of attorney to Barton S. Wilson, of Boonville, in the said county of Cooper, for the purpose of settling up his business. The power of attorney is in these words:

"Know all men by these presents, that I, Horace H. Brand, of the county of Cooper and State of Missouri, have made, constituted and appointed, and do by these presents make, constitute and appoint Barton S. Wilson, of the city of Boonville in said county, my true and lawful attorney in fact for

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me and in my name, to transact all my business of every kind and description, to collect and receipt for all moneys due and owing to me, and to sell and dispose of all my property, real and personal, for such price and on such terms as he may choose whenever he may think it advisable to make such sale, hereby ratifying and confirming all such acts of my said attorney. Given under my hand and seal this 8th day of July, A. D. 1861. Horace H. Brand. (Seal.)"—Which instrument was duly acknowledged before the clerk of the Circuit Court of Newton county.

Wilson, the attorney under the foregoing power, took possession of most of the personal property of Brand, and conveyed the same by deed of trust to Burr, the garnishee, to secure and pay off certain creditors and sureties of Brand.

There is but one single point presented here for decision, and that is whether the letter of attorney authorized the execution of the deed of trust. The general rule is that the power must be pursued with legal strictness, and the agent can neither go beyond it nor beside it; in other words, the act done must be legally identical with that authorized to be done. But, in all cases, the authority should be construed and the intention of the principal should be ascertained in reference to the purpose of the appointment, and a consideration of the object which the agent is directed to accomplish will either expand the powers specified as a means of executing it, or limit the exercise of the most general powers conferred. Accordingly, it is a general maxim, applicable to special and limited agencies, as well as those which are more comprehensive and discretionary, that, in the absence of special instructions to the contrary, and in the absence of such prescription of the manner of doing the act as implies an exclusion of any other manner and authority or direction to do an act or accomplish a particular end, implies and carries with it authority to use the necessary means and inducements, and to execute the usual, legal and appropriate measures proper to perform it.

The principal authority includes all mediate powers which

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are necessary to carry it into effect. A direction or authority to do a thing is a reasonable implication of the powers necessary to accomplish it, unless there is a special restriction, or unless an intention to the contrary is to be inferred from other parts of the authority. (1 Am. Lea. Ca. 568; *Rogers v. Kneeland*, 10 Wend. 218; *Peck v. Harriott*, 6 Serg. & Ra. 145; *Bayley v. Wilkins*, 7 Com. Bench, 886.)

It will be seen that the power of attorney in this case is of the most comprehensive character; it gives the agent full authority to transact all business of every kind and description, to collect and receipt for all moneys due, and to sell and dispose of all property, both real and personal, for such price, on such terms, and at such time, as he might deem advisable. The attendant circumstances leave little room to doubt what power was intended to be given.

Brand was absent from his home, with no intention or prospect of returning; he had left a large amount of business unsettled—property liable to go to decay and be destroyed, and creditors anxious to secure their debts. He therefore executed a power of attorney, giving his agent full authority to transact all his business of every kind and description; and this power must be interpreted, and the true intention arrived at, by a direct reference to the nature of the business to be transacted.

There can be no doubt that the main business to be transacted was the application of the property to the payment of the debts. If there was no intention to invest the agent with authority to pay off the debts, why the enlarged and general power to transact all business in addition to the power to sell and dispose of property? But if the power was given to pay debts, was the making of the deed of trust a proper execution of it? We think it can be implied in this case without doing violence to any legal principle. The deed of trust was certainly just and equitable to the creditors, as it distributed the proceeds of the property ratably among them. If it was a fit and appropriate mode of carrying out the purpose of transacting all the business, it was competent to resort to it.

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In the *Bank of Missouri v. McKnight*, 2 Mo. 38, the words used in the power were, "to devise, lease and let a certain lot of ground, for a term of years not exceeding twenty, for such rent, or otherwise to sell, grant or convey absolutely in fee simple;" and this court held that a power to make a mortgage was included. The object then was to obtain money, and the court say, "the intention of the party giving the power should in all cases govern the construction to be given to it, and determine the extent of the authority."

There is another objection urged by the defendant in error here, and by which we understand the decision of the court below was mainly influenced, and that was that Wilson could not delegate his authority, as the letter of attorney contained no power of substitution. The question of delegation of power is not involved. Wilson delegated none; his power ceased with the execution of the deed of trust; that instrument carried with it the whole legal title; and he as trustee in his own name, and as owner of the property—not as agent for another—was authorized to sell it absolutely, and apply the proceeds to the purposes created in the trust.

The judgment is reversed and the cause remanded. The other judges concur.



86	90
95a	*410

BANK OF THE STATE OF MISSOURI, Respondent, v. JAMES VAUGHAN et al., Appellants.

1. *Practice—Variance.*—A bill was made payable at "the Bk. of Mo. at St. Louis"; the petition alleged presentment of the bill "at the Bank of the State of Missouri at St. Louis, Mo., the place designated in said bill for payment." *Held*, no variance.
2. *Bill of Exchange—Notice.*—A bill payable at St. Louis was protested for non-payment, and the notary enclosed the notices to the drawer and endorsers to the last endorser at Springfield, Mo., which was the proper post-office address; he deposited the notices, on the day of their receipt, in the post-office at Springfield. There being no evidence that the prior endorsers and drawer resided in the town of Springfield, *held*, that the notices were properly served.
3. *Bill of Exchange—Notice—Agent.*—The cashier of a bank, the holder of a bill of exchange, is the agent of the holder, and is competent to give the notice of demand and refusal of payment.

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Appeal from Greene Circuit Court.

Ewing & Muir, for respondent.

I. The notary's protest is evidence of a demand and refusal to pay a bill of exchange at the time and manner stated on such protest. (R. C. 1855, § 20, p. 293.)

II. The notice given to the endorser and drawer was legal and proper. (Sto. Prom. No. § 301; 8 Kent, Com. 139-40.)

III. The certificate of the notary and his affidavit are evidence of the facts therein stated and the manner of said acts. (R. C. 1855, p. 733, § 57.)

IV. There is manifestly nothing, it is submitted, in the point as to a variance between the petition and the bill read in evidence. The abbreviations of themselves clearly enough express their own meaning, when the whole instrument is considered. But there is an averment as to the meaning and sense of these words, by the allegation that the bill was "duly presented at the Bank of the State of Missouri at St. Louis—the place designated in said bill for payment—to the teller," &c. And there is no denial of these averments, or that, in promising to pay at the "Bk. of Mo. at St. Louis," defendants did not thereby promise to pay at the Bank of the State of Missouri.

The certificate is full, and contains all the facts necessary for it to set forth, under the statute, to make a good notice.

It is good independent of Danforth's testimony; but there was no objection to his (Danforth's) testimony because it contradicted the protest. But if there is any variance, it is cured by verdict. (R. C. 1855, p. 1256-7.)

Lindenbower & Sherwood, for appellants.

The court should not have permitted the certificate of protest of the notary to be offered in evidence; the certificate is only evidence of such facts as it may lawfully contain. The certificate in this case did not set forth such facts as are required by law to be set forth—R. C. 1855, p. 733, § 57: that section requires that notice of dishonor, given to the

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"parties thereto," be set forth in the certificate. From all that appears by the statement of the notary, notice was given to "a mere stranger." The certificate of protest of a notary, prior to the above statute, was not evidence of the dishonor of inland bills of exchange, and that act, consequently, should be strictly construed as being in derogation of the common-law merchant.

25. / The court erred in permitting the introduction of Danforth's statement regarding the depositing by him of the notice in the post-office, because he was neither a holder of, nor a party to, the bill; nor entitled to call for payment, nor reimbursement. (*Chauvine v. Fowler*, 3 Wend. 173; *Bay. on Bills*, 248; 8 Mo. 336; 18 John. 327; *Sto. on Bills*, 454, § 388, *ex parte Barclay*; 7 Vt. 597.) There was no agency or authority on the part of Danforth shown. (*Ib.*)

The bill of exchange should not have been admitted; it was not such a one as plaintiff had declared upon. There is no rule better established than that "the evidence must correspond with the allegation and be confined to the point in issue." The allegation was the execution of a bill of exchange, payable at the Bank of the State of Missouri; the issue was whether such a bill had been executed. The affirmative of that issue, that the appellants had executed such a bill, was not supported by a bill payable at "the Bk. of Mo." The proper basis was not laid for the introduction of the bill in evidence even had it been otherwise admissible.

LOVELACE, Judge, delivered the opinion of the court.

This was an action upon a bill of exchange, of which Vaughan was the drawer, Jabez Owen (deceased) the acceptor, and W. H. Barden the endorser. The cause was tried in the Greene Circuit Court, and a judgment rendered for the plaintiff, to reverse which the defendants appeal to this court.

Two grounds are relied on to reverse the judgment of the Circuit Court; first, a variance between the bill declared on and the one offered in evidence; and, second, because due

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notice was not given to the drawer and endorsers of the presentation and non-payment of the bill. These objections will be considered in their regular order.

The petition states that "on the 21st day of March, 1861, James Vaughan, defendant, made his bill of exchange, in writing, and directed the same to Jabez Owen (since deceased) at Springfield, Mo., and thereby requested said Owen to pay to the order of Wade H. Barden (by name of W. H. Barden), four months after the date thereof, the sum of nine hundred dollars, and delivered the said bill of exchange to the said Wade H. Barden, who endorsed and delivered the same to plaintiff, who, on the — day of —, duly presented the same to the said Jabez Owen for acceptance, which the said Owen duly accepted; plaintiff, on the 24th July, 1861, duly presented the said bill of exchange *at the Bank of the State of Missouri, at St. Louis, Mo.*—the place designated in said bill for payment—to the teller thereof, and demanded of said teller payment of the same, which payment the said teller then and there refused and declined to make; whereupon the same was duly protested for non-payment, of which the defendants, respectively, had due notice."

The defendants' answer denies the execution of the bill of exchange described in the petition; but admits the execution of a bill of exchange such as described in the petition, except that the same was made payable at "the Bk. of Mo. at St. Louis," and not payable at "the Bank of the State of Missouri." The answer also denies that the bill was duly presented for payment and the defendants duly notified thereof.

I am unable to see any variance between the instrument declared on and the one offered in evidence. The petition says that the bill was presented at "the Bank of the State of Missouri at St. Louis, the place designated in the bill"; the bill says it is payable at "the Bk. of Mo. at St. Louis." This would seem to be a sufficient averment of what the abbreviations "Bk. of Mo." meant. It would, perhaps, have been better if the petition had contained an averment showing

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what the abbreviations meant, but it does not appear that any person was misled by its failure to do so. In fact, it would be difficult to construe the abbreviation into anything else than the Bank of the State of Missouri. The court committed no error in admitting the instrument to be read.

The second objection urged by the defendants is that they were not duly notified of the presentation and demand for payment, and the non-payment of the bill. The post-office address of the defendants is proven to be Springfield, Mo., and the bill was presented for payment at St. Louis. The notary, after protesting the bill in the ordinary form, says—"of all which I have given due notice to the parties in manner following: through the post-office, to James Vaughan, drawer thereof; to Jabez Owen, acceptor thereof, and to W. H. Barden, endorser thereof—all under cover to the address of James R. Danforth, Cas., Springfield, Mo."

Danforth says, in his evidence, that he received, by due course of mail from St. Louis, notice of the non-payment of the bill of exchange, and during the same day he deposited in the post-office at Springfield, Mo., written notices, being the same received from St. Louis addressed respectively to Wade H. Barden, and James Vaughan, at Springfield, Mo.; that he knows that the post-office address of Barden and Vaughan was Springfield, Mo. His evidence further shows that he was the cashier of the State Bank at Springfield, and as such discounted the bill in question.

The defendants object to this notice because it was sent to Danforth instead of the defendants, and that Danforth was a stranger to the bill, and therefore could not give a legal notice of the non-payment and protest. The statute (1 R. C., § 57, p. 733) provides that the certificate of a notary public protesting a bill of exchange or negotiable promissory note, without as well as within this State, setting forth the demand of payment refused, protest therefor, and dishonor to parties thereto, and the manner of each of said acts, and verified by his affidavit, shall, in all courts in this State, be *prima facie* evidence of such facts."

But it is objected that the certificate of the notary, in this case, does not comply with the statute; that the certificate shows that the notices were sent to Danforth, when they should have been sent to the defendants, and that the certificate of the notary, like the return of an officer, is only evidence of such facts as the law requires to be stated. The vice of this argument is, that the law does not provide the manner of the notary's giving notice, but requires him to certify the manner of the protest and notice; and the court must judge whether it was properly done or not. The notary might present the bill on the day before its maturity, or the day after its maturity, in which case the protest would certainly be bad; but the certificate of the notary would, nevertheless, be evidence of the manner in which it was done; and, in this case, the certificate is evidence of the presentation of the bill, the demand for payment, the refusal to pay, the protest, and the putting the notices in the post-office: all this the law makes it his duty to do, and it makes his certificate evidence of the manner in which he did it.

The next objection is, that Danforth is a stranger to the bill, and therefore had no right to give this notice. There is nothing better settled in the mercantile law than the doctrine, that a mere stranger has no right to give notice of the non-payment of a bill. The rule is, that the notice is to be given by the holder, or by some agent or other person duly authorized by him, or, at all events, by some person who is himself liable to pay the bill, and is a party thereto. (Sto. on Prom. No., § 301; Bay. on Bills, 248.) But, in this case, was Danforth a mere stranger to the bill? He was cashier of the Bank of the State of Missouri at Springfield, which bank was the holder and owner of the bill; he was the agent of the plaintiff, who had discounted the bill in the first instance. I think there can be no doubt that his agency was sufficient to enable him to give the notice. In the present case, however, the notice comes from the notary whose duty it is, under the statute, to give notice; and the only question really is, whether he used proper diligence in giving the no-

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tice. The rule is, that, when the parties live in the same town or city, the notice must be given to the party entitled thereto, either personally, or at his domicile or place of business—(Sto. on Prom. No., § 312); but when the parties reside in different towns or cities, then notice may be sent by mail, or by special messenger, or by a private hand, or by any other suitable and ordinary conveyance.

The bill was payable in St. Louis, and was presented and protested there by the notary, and the notices sent from St. Louis to Springfield, which latter place was the post-office address of the defendants. It is objected by appellants' counsel that the notices were to Danforth instead of the defendants, and that that circumstance would put it upon the same ground as if the bill had been protested at Springfield; in which case, they insist it would be necessary to give personal service, or leave the notice at the domicile of the defendants or their usual place of business in Springfield. I am not certain but that would be correct if the record had shown that the defendants resided in the town of Springfield, or had a place of business there. But the evidence is that Springfield was their post-office address; they may have lived several miles from the town, and had no place of business in the town, in which case the post-office would be the most direct way to reach them. The evidence shows there was no delay by sending the notices to Danforth. He put them in the post-office the same day he received them. The notice seems to have been as expeditiously given as it could well be.

The other judges concurring, the judgment is affirmed.

JOHN M. RICHARDSON, ADM'R, &C., Plaintiff in Error, v.
 MARTHA L. HARRISON, ADM'X, Defendant in Error.

Administration—Limitations.—If the administrator give notice of the grant of letters, all claims not presented within three years will be barred, unless the creditor can bring himself within the exceptions of the statute. The presentation of the claim in the manner provided by the statute will save the limitation. Proof that the civil law was suspended, on account of the war, during a portion of the period, will not extend the time for presenting the claim.

36	96
101	694
36	96
120	151
36	96
140	606

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Error to Laclede Circuit Court.

J. M. Richardson, Ewing & Muir, for plaintiff in error.

The answer set up no defence to the action; it made no proper issue as to the statute of limitations. It should have alleged that the cause of action had accrued more than three years before suit brought. (Finney, Adm'r, &c., v. State to use of Estes, 9 Mo. 228.) In the case at bar, the suit is by an administrator against another administrator. When the statute of limitations is relied on, the defendant setting it up must allege and prove everything necessary to make the statute a bar to the claim sued on. Suppose the plaintiff's intestate (Shephard) died before the defendant's intestate, and that letters of administration were not granted on his estate until one year after the death of Harrison, defendant's intestate, then it is clear the action of plaintiff would not be barred; and, for aught that appears in the record, such was the state of facts. In the case supposed, the statute not having commenced running in the lifetime of the plaintiff's intestate, it did not commence running until the grant of administration upon his estate. (Ang. on Lim., § 55 & 56, and authorities there cited.)

The petition is complete, and shows a good cause of action well pleaded. It was not necessary, nor was it incumbent, to allege in the petition anything more (so far as his representative character was concerned) than a grant of administration to him upon the estate. Defendant, if he rely upon the statute, must allege and prove that the cause of action accrued more than three years before suit brought; which he has failed most signally to do. To allege and prove that more than three years had elapsed before this suit was brought is unimportant; it constitutes no bar whatever to the action. Plaintiff's right to recover on his petition is not affected by anything alleged or proved by defendant, and the case stands as though no answer whatever had been put in by the defendant.

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Sherwood & Young, for defendant in error.

The declaration of law asked by the plaintiff was by the court very properly refused. (Smith, Adm'r of Taylor, v. Newby, 13 Mo. 159; Ang. on Lim., §§ 23, 194, 476, 478, 479, 485, 486, 487, 488; Beckford et al. v. Wade, 17 Vt. Ch. 86; Hall v. Wyburn, 2 Salk. 420; Bac. Ab. 480.)

The 2d section of 4th article, title Administration, p. 152, provides — “All demands not thus exhibited within three years shall be forever barred, saving to infants, persons of unsound mind or imprisoned, and married women, three years after the removal of their disabilities.”

The words of this statute are general, and as such must receive a general construction, and there can legally exist no exception outside of those enumerated in the statute itself. The authorities on this point are almost unbroken in their uniformity. (Demarest and wife v. Wynkoop et al., 3 John. Ch. 129, and cases there cited.)

LOVELACE, Judge, delivered the opinion of the court.

This is an action on a promissory note, executed by J. B. Harrison, J. T. Hooker, and Tom. Craig, on the 20th day of February, 1860, for six hundred dollars, payable one day after date to Thomas Stafford. The petition is an ordinary declaration on a promissory note, and sets out that Thomas Stafford had departed this life, and the plaintiff had taken out letters of administration on his estate; and also alleges the death of Harrison, and that the defendant Martha L. Harrison was the executrix of his last will; also the death of Tom. Craig, and that Mary Craig was his executrix. The defendants Hooker and Craig make default, and Martha L. Harrison answers.

The answer denies nothing in the petition, but states that the defendant is the executrix of the last will of John B. Harrison, deceased, and that letters were granted her as such executrix on the — day of August, 1860, and that she gave the notice of the granting of said letters within thirty days

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of the granting of the same, and defendant denies that the plaintiff is entitled to judgment on said note mentioned in his petition, or any part thereof, because more than three years had elapsed since the granting of letters and notice aforesaid when this suit was brought against this defendant. A trial was had upon the issues joined and a verdict for the defendant.

On the trial, the plaintiff read his note in evidence and rested his case; the defendant then proved that her letters testamentary were dated on the 15th day of August, 1860, and that she made publication of her administration on the first day of September, 1860. The plaintiff proved, in rebuttal, that the civil law was suspended in Laclede county from the first of August, 1861, until the first of April, 1862, a period of eight months. The record shows that his suit was commenced on the 8th day of March, 1864.

The only question in this case is whether this demand was barred by the statute. The statute provides (§ 1, p. 151, R. C. 1855) that all demands against the estate of deceased persons shall be divided into classes as specified in that section, and requires the demands to be presented to the county court for allowance and classification; and § 2 provides that "all demands not thus exhibited within three years shall be forever barred, saving to infants, persons of unsound mind or imprisoned, and married women, three years after the removal of their disabilities"; and § 5 provides that "any person may exhibit his demand against such estate by serving upon the executor or administrator a notice, in writing, stating the amount and nature of his claim, with a copy of the instrument of writing or account upon which the claim is founded, and such claim shall be considered as legally exhibited from the time of serving such notice." These are the provisions of the statutes for enabling claimants to present their claims against estates for allowance and payment.

In the present case, the note became due in February, 1860; letters were granted upon Harrison's estate on the 13th of the following August, and no efforts were made to

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present the note for allowance and payment (as we are informed) until the 8th of March, 1864, more than four years after the note fell due, and three years and a half after the grant of letters; and the only excuse attempted to be set up for this is, that the civil law was suspended in Laclede county for a period of eight months—from August, 1861, to April, 1862—on account of the civil war. The general rule is, that when the statute begins to run it will continue to run; and a party wishing to make an exception to the rule, must show affirmatively such facts as will take his case out of the rule.

Here it is said that the civil law was suspended, and it is contended that the time it was suspended ought to be deducted from the time it had to run. But it does not appear that it was suspended for nearly a year after the statute had commenced running; nor does it appear that the plaintiff's remedy was ever suspended, for he might still have served a notice on the executrix, and that would have had the effect to save the bar. It has been held (*Hall v. Wyburn*, 2 Salk. 420), that though the courts of justices should be closed so that no original writ could be filed, yet the statute would bar the action; because the statute is general and must work upon all cases which are not exempted by the exceptions, and the plaintiff here has not shown himself to be among those excepted in the statute. He does complain that the defendant's answer does not set up a good bar to plaintiff's cause of action, and *Finney, Adm'r, v. State* to use of *Estes*, (9 Mo. 288,) is relied on in support of that position. That case was an action upon a guardian's bond; the suit was brought against *Finney*, as administrator of *McCalister*, upon a bond executed by one *Joseph Edmondson* as guardian of *Edward T. Estes*, and *McCalister* and others as securities. In that case, the plea alleged "that the suit was not brought within the three years after granting of letters of administration," and the court held that it was bad; but said—"We have heretofore intimated that so *literal* a construction of the statute would not conform to the general principles of justice, and that cases like the pres-

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ent one are *not* within the rule." In that case, the breaches assigned in the petition took place more than three years after the granting of letters, and, as a matter of course, the action could not be commenced within three years from the date of the letters. That case was an exception to the rule, and the court so stated, because the declaration showed that the cause of action accrued long after the granting of letters; but in the case at bar the petition shows that the cause of action accrued nearly six months before the date of the letters, and no excuse is given for not commencing the suit, or at least presenting the claim to the executrix.

The statute contemplates that estates will be fully administered in three years, and in order to do this it is necessary that claims should be allowed and paid before that time; and if claims are held up, the claimant ought to show that he comes within the exceptions mentioned in the statute, otherwise his claim will be barred.

Judgment affirmed; the other judges concurring.

H. W. HUTHSING, Defendant in Error, v. JACOB P. MAUS,
Plaintiff in Error.

1. *Practice—Change of Venue.*—In civil suits, the affidavit in support of a motion for change of venue must be sworn to by the party himself. (*Levin v. Dille*, 17 Mo. 64, affirmed.)
2. *Practice—Depositions.*—Where the deposition of a witness, residing more than forty miles from the place of trial, was taken, it may be read in evidence, although the witness may have attended at the court, if he depart before the trial without the consent or collusion of the party offering the deposition.
3. *Practice—Dismissal.*—After the cause was submitted to the jury and they had retired to consider their verdict, the plaintiff suggested the death of one of the defendants and dismissed the case as to him; held, that § 48, p. 1269, R. C. 1855, did not apply to the case, and that such dismissal was properly entered.

Error to Cole Circuit Court.

This was a suit in the Cole Circuit Court to August term, 1860, by Henry W. Huthsing against Saunders and Maus, who

36	101
31a	140
36	101
40a	592
36	101
102	653
36	101
113	406
36	101
119	126
36	101
157	487
157	491
157	492
157	493

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were partners and subcontractors on the 20th section and 3d division of the Kansas route of the Pacific railroad, for a balance alleged to be due plaintiff below for work in excavating earth, rock and hard-pan, extra hauling and clearing, which Huthsing did under a parol agreement made by Saunders and Maus with Huthsing on said section and division.

Defendants answered and admitted that they were partners as stated in plaintiff's petition, and denied all the material allegations in plaintiff's petition, then admitted a contract made by them with William Huthsing, &c., which was the same as that alleged in plaintiff's petition, and also admitted that the same had been done, but averred that it had been paid.

At the August term, 1863, a petition was filed in the cause, sworn to by Jacob H. Maus, for a change of venue, which was overruled by the court. The cause came on for trial. Plaintiff proved by several witnesses that he had the work done on the 20th section of 3d division of Pacific railroad; that Maus admitted the contract as alleged in plaintiff's petition. Others testified that the 20th section of 3d division of Kansas route of Pacific railroad is between Jefferson City and California, Mo., and that it was the custom to make estimates of work done on that part of the road one month after the work was actually done; that Kirkwood, Porter & Co. gave one per cent. additional per cubic yard for every hundred feet haul over five hundred feet. Shiffbauer testified that he had no interest in the contract with Saunders and Maus, nor ever had any contract with them; that it was the custom on the road to retain ten per cent. of the contract price for the work done at each estimate.

The defendants offered evidence of payments made.

The plaintiff then asked the following instructions:

"1. If the jury believe from the evidence that the plaintiff and defendants entered into an agreement by which plaintiff was to work on section 20 of 3d division of Kansas route of the Pacific railroad, and that the defendants were to pay the plaintiff therefor the prices named in the petition

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for earth excavation and for hard-pan and for rock excavation, and one cent for extra haul—that is to say, one cent additional for every cubic yard for every 100 feet over 500 feet—said hauling to be estimated at the same rate agreed upon between defendants in their contract with Kirkwood, Porter & Co.; and if the jury further believe that plaintiff commenced said work under said contract and continued the same until the defendant failed to pay him according to said agreement, then the jury will find for the plaintiff whatever sum or balance they may believe him entitled to from the evidence, together with six per cent. interest on same from the time it should have been paid.

“2. The answer admits that the quantity of earth excavation and hard-pan excavation mentioned in the petition was done and performed on section 20, and the prices claimed in the petition as having been agreed upon between the parties are also admitted in the answer to be the prices which the defendants were to pay for said work.

“3. If the jury believe from the evidence that the ten per cent. of the estimates of the work was retained by the defendant at the time of any monthly estimate, and is still retained, they will include such per cent. in making their verdict.

“4. If the jury believe from the evidence that any order or receipt, read in evidence by defendants, were included in the monthly settlement or settlements, they will not give the defendant additional credit therefor.”

Which were given, and defendants objected and excepted.

The defendants then asked the following instructions:

“1. The jury are instructed to exclude from their consideration all that part of the deposition of Geo. W. Way there contained in ‘Exhibit A.’ which states as follows—‘Clearing 6 $\frac{1}{4}$ acres; 3d class measure, 165 $\frac{3}{16}$ cubic yards; fencing, 42 yards.’

“2. [Refused. See opinion.]

“3. The jury are instructed further to take into their consideration all the facts and circumstances in evidence

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that tend to prove that defendants fully paid plaintiff for all or any work and labor done by him under the special contract set out in plaintiff's petition.

"4. Whatever interest the jury may believe the said witness William Shiffbauer may have in the result of this action, should go to and offset, that far, his credibility.

"5. The plaintiff in this case has sued upon a special contract, and before the jury can find for the plaintiff they must believe from the evidence that plaintiff and defendants entered into a contract for the performance of the work and labor as charged in plaintiff's petition.

"6. If the jury believe from the evidence that the plaintiff and defendants entered into the agreement stated in plaintiff's petition, and did work and labor in pursuance thereof; yet if they further find that the plaintiff abandoned the said work and labor under said agreement without the fault of defendants, they will find for the defendants."

The second and sixth instructions were not given, and defendants excepted. The case was submitted to the jury, and after the jury had retired the death of Saunders was suggested and the suit dismissed as to him; to which attorneys for Maus objected; but the objections being by the court overruled, defendants excepted. The jury returned a verdict for plaintiff and assessed his damages at five hundred dollars.

J. L. Smith, for plaintiff in error.

I. The court committed error in refusing to grant defendants the change of venue prayed for in the petition. There was no objection taken to the petition, except that the same was not sworn to by one of the defendants instead of J. H. Maus, the son of defendant J. P. Maus. The statute was complied with. The agent and son of defendant Maus, in the absence of either defendant, properly made the affidavit to the petition. (R. C. 1855, p. 1559, §§ 1-3; p. 1184, § 20; p. 1234, § 20.) It was not the intention of the law-makers that the petition for change of venue should be veri-

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fied by the party alone seeking such change, and not by his agent, as in case of other petitions.

II. The Circuit Court committed error in allowing plaintiff to read in evidence to the jury the deposition of James W. Way; first, because the said witness was in the city of Jefferson, the place of trial of said cause, on a subpoena to testify at the time of trial, and because he was not gone a greater distance than forty miles from the place of trial, &c. (R. C. 1855, p. 658, § 28.)

III. The first instruction asked by plaintiff did not contain the law of the case, because there was no evidence upon which to predicate the same; and is further objectionable, in assuming that defendants failed to pay plaintiff in pursuance of said contract, without leaving that fact for the jury to find. (Gibson v. Long, 29 Mo. 133.) The answer of the defendants does not admit the facts stated in plaintiff's second instruction. There was not a shadow of evidence that authorized any such declaration of law as contained in the plaintiff's third instruction. The fourth instruction is not objectionable so far as the law abstractly is declared, but there was no evidence tending to show such a state of facts as it assumes. These instructions ought not to have been given, as they were calculated to mislead the jury.

IV. The second instruction asked by defendants was a correct embodiment of the law as applicable to this case. Plaintiff sued on a special contract, and evidence tending to show work and labor done for defendant not under said contract was inadmissible. The sixth instruction asked by defendants was clearly the law of the case. (Helm v. Wilson, 4 Mo. 41; Wolcot v. Lawrence Co., 26 Mo. 272; Posey v. Garth, 7 Mo. 94; Schnerr v. Lemp, 19 Mo. 40; Henson v. Hampton, 32 Mo. 408; Marsh v. Richards, 29 Mo. 99.)

V. The court erred in permitting plaintiff to dismiss his suit as to J. W. Saunders. The defendant Saunders had died before trial, and no steps were taken to make his administrator a party defendant. This case does not fall within the provisions of art. 19 of the Practice Act, prescribing the

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circumstances under which a plaintiff may dismiss his petition as to some of the defendants. The plaintiff should not have been permitted to dismiss as to Saunders after verdict, or the return of the jury with their verdict.

VI. The court below should have interfered and set aside the verdict of the jury, because the record shows the fact that plaintiff abandoned his alleged agreement in the latter part of October or first of November, 1856, and defendant produced his receipts in full up to 1st of November of that year, and several receipts for smaller sums paid subsequently.

Ewing & Belch, for defendant in error.

The court committed no error in overruling the objections of defendant (below) to the reading of the deposition of Way; he had been brought by the plaintiff (below) into court to testify, and was not absent by his consent or connivance—was not a resident of Cole county, and it was admitted that he lived more than forty miles from the place of trial, and there was even no evidence of the fact that witness was at the time of the trial within 40 miles of the place of trial.

The objection that the deposition referred to estimates of work on the 20th of October, 1856, was properly overruled, as witnesses testified that it was the custom to make the estimates "a month after the work was done."

The second and sixth instructions asked by defendant below were erroneous and were properly refused. The fifth instruction given for defendant put the case in the most favorable light he could ask.

The application for a change of venue was properly refused. The agent of defendant had no right, nor does the statute authorize him, to make the application. The application was not made in time, nor was the notice, as required by statute, given. (R. C. 1855, p. 1559.)

As to the right of plaintiff to dismiss as to one of defendants and take judgment against the other, there can be no question.

HOLMES, Judge, delivered the opinion of the court.

This was a suit for work and labor done by the plaintiff on section 20 of the 3d division of the Pacific railroad, in excavating, hauling and clearing, at certain prices and rates agreed on with the partnership firm of Saunders & Maus, subcontractors, in the year 1856. The plaintiff continued the work according to agreement until he was prevented from the further prosecution of it by reason of the failure of his employers to make payment for the same according to the contract; and he claimed a balance still due him of \$1,329.50, for which he asked judgment.

The answer of the defendants denied the truth of the facts as stated in the petition, but admitted a like agreement between themselves and Henry Huthsing and W. Schiffbauer as partners; and they alleged that all the work that was done had been paid for.

There was a trial by jury, and a verdict was rendered for the plaintiff for \$500. There was a motion for a new trial, and a bill of exceptions filed in which several questions are presented for decision: they will be taken up in their order.

1. And, first, it appears, that, at the August term of the court in 1863, the defendant Jacob P. Maus filed a petition for a change of venue, on the ground that the inhabitants of the county were prejudiced against him. This petition was sworn to by one Jacob H. Maus, as the agent of the defendant. The court refused to grant the petition. The statute concerning change of venue in civil cases evidently contemplates that the application shall be made by the party himself, and it expressly requires that he "shall annex thereto an affidavit to the truth of the petition." The act makes no provision for this oath being taken by an agent. The act concerning practice in criminal cases expressly provides that the affidavit may be made by an agent; and it may very well be that the Legislature saw good reason for making the application in civil cases rest on the personal knowledge and the conscience of the party himself. A change of venue is

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not authorized unless all the provisions of the statute in relation to the application have been complied with. In *Levin v. Dille* (17 Mo. 64) the affidavit was made by an attorney, and it was held that the application was properly refused, as not being in compliance with the statute. We think there was no error in refusing a change of venue.

2. Another ground of exception was the admission of the deposition of James W. Way. It was admitted that the witness resided at a distance of more than forty miles from the place of trial; and though he had been in attendance for several days and until the day of trial, it appears that his absence was without collusion or the consent of the plaintiff. We think the deposition was rightfully admitted to be read.

3. Four instructions were given for the plaintiff, and several were given for the defendants, two only being refused. On a careful examination, we are of opinion that the instructions given for the plaintiff correctly state the law of the case and were well warranted by the evidence. The second instruction refused for the defendant was as follows:

"2. The jury are further instructed to exclude from their consideration any evidence that tends to show plaintiff did work and labor for the defendants, unless they find the same was done under the special contract stated in plaintiff's petition."

So far as any special contract is stated in the petition, the evidence offered by the plaintiff seems to have been pertinent to the issues actually made, and we have failed to discover any evidence tending to show any other or different contract than that in the petition contained. We do not see that the defendant was injured by the refusal of the instruction.

The other instruction which was refused for the defendant was to the effect, that, if the plaintiff had abandoned the work without the fault of the defendant, he could not recover.

There does not appear to have been any evidence in the case which could be considered as furnishing a foundation for such an instruction; on the contrary, all the evidence bearing upon the particular subject seems to have been di-

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rectly the other way. . We think this instruction, also, was very properly refused.

4. It further appears from the bill of exceptions, that after the jury had retired, and before they had made up their verdict, the plaintiff suggested the death of Saunders, one of the defendants, and dismissed his petition as to him; and thereupon the verdict was rendered against the other defendant only. The defendant insists that the plaintiff had no right to suffer a non-suit or dismissal after the cause had been submitted to the jury. The proper construction of the 48th section of article 10 of the Practice Act (R. C. 1855, p. 1269), which reads as follows—"No plaintiff shall suffer a non-suit or dismissal after the cause, upon a hearing of the parties, shall have been finally submitted to a jury, or to the court, for their decision"—has been the subject of discussion in this court in several cases.

In the case of *Hesse v. The Mo. State Mut. F. & M. Ins. Co.* (21 Mo. 93), the cause had been tried before the court sitting as a jury, and the finding of the court had been amended, when the plaintiff asked for leave to take a non-suit, which was refused; and this court held it was too late, after the final decision had been made known.

In *Lawrence v. Shreve* (26 Mo. 492), it was determined that where a cause is taken under advisement by the court upon instructions to be considered, and no day is named for the announcement of the decision, the plaintiff is entitled to be informed of the decision upon the instructions, and, after that, to have an opportunity to take a non-suit before the final submission of the cause: and in the case of *Hensly v. Peck* (18 Mo. 587), a jury was recalled the next morning after they had retired, when the instructions were withdrawn and new instructions given; whereupon the plaintiff took a non-suit with leave, and it was decided that the court, "in all this, had not acted indiscreetly or illegally."

Without undertaking to draw the limit with exact precision, it would seem to be reasonable that some latitude of discretion should be allowed. The jury may have retired,

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and yet it may reasonably be considered that neither the case nor the jury had passed entirely beyond the control and discretion of the court, so that it must necessarily be said that a final submission had been made. In this case, the plaintiff did not take a non-suit; he only dismissed as to one defendant, and that a party deceased. A judgment against Saunders, after his death had been suggested, would have been erroneous, (*Wittenburgh v. Wittenburgh*, 1 Mo. 161,) and would have been vacated even at a subsequent term. (*Stickney v. Davis*, 17 Pick. 169; *Stacker v. Cooper* Cir. Ct. 25 Mo. 401.) It would have been utterly useless to have taken a verdict on that state of the record, and we do not see that it was an illegal or improper exercise of the power of the court to allow this dismissal to be entered at the time it was done; nor does it appear that any injustice was thereby done to the other defendant.

The judgment will be affirmed; the other judges concurring.

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N. A. H. MURPHY *et al.*, Respondents, v. JOHN P. CAMPBELL,
Appellant.

Jurisdiction—Courts.—The Circuit Court has concurrent jurisdiction with justices of the peace in actions on contracts, only in cases where the amount exceeds fifty and is less than ninety dollars. (R. C. 1855, p. 533, § 8.)

Error to Greene Circuit Court.

T. A. Sherwood, for appellant.

The motion in arrest should not have been overruled, even if the Common Pleas Court had jurisdiction of the cause. The act of the plaintiffs in amending their petition and suing for fifty dollars only, thereby ousted the jurisdiction of the Circuit Court. (R. C. 1855, § 8, p. 533; *Webb v. Tweedie*, 30 Mo. 488.)

HOLMES, Judge, delivered the opinion of the court.

The plaintiffs filed their petition in the Probate and Com-

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mon Pleas Court of Greene county, founded on a wrongful taking of three head of beef cattle of the value of fifty dollars; and, after answer denying the petition, there was a change of venue to the Circuit Court of the county of Greene. At the July term, 1864, the plaintiffs filed an amended petition, claiming the sum of fifty dollars for three head of beef cattle sold and delivered to the defendant. The answer admitted the purchase of the cattle, but alleged that they were bought by the defendant as the agent of Leonidas C. Campbell, with the knowledge of the plaintiff, and that the plaintiff had accepted payment for the same in full from him; and the indebtedness was denied. There was a trial by jury, and a verdict for the plaintiff for fifty dollars.

The defendant filed a motion for a new trial, and a motion in arrest of judgment, on the ground (among others) that the amount sued for did not come within the jurisdiction of the Circuit Court. It is very plain that the objection to the jurisdiction was well taken. The statute confers on the Circuit Courts concurrent jurisdiction with justices of the peace, in actions founded upon contract, only where the amount claimed, exclusive of interest, shall exceed fifty dollars, and not exceed ninety dollars. (R. C. 1855, p. 533.)

For this reason the judgment will be reversed and the cause ordered to be dismissed. The other judges concur.

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C. B. FIREBAUGH AND JAMES BROWN, Plaintiffs in Error, v.
ISRAEL STONE, GARNISHEE OF DYER & ROBERTSON, Defendant in Error.

Attachment—Garnishee.—The garnishee stands in the relation of debtor to the defendant in the attachment suit, and any defence that he can set up against such defendant, he may also use in resisting the claim of the attaching creditor.

36	111
122	104
57a	25
59a	34
36	111
66a	184

Error to Callaway Circuit Court.

Hayden & Belch, for plaintiffs in error.

I. The court erred in allowing the defendant Stone to retain the money in his hands to be appropriated to the

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payment of debts owing by Dyer & Robertson to him. His answer admits a certain fund in his hands, acquired by him under a void assignment, consisting of money specially designated in the answer as United States legal tender notes, and other notes and accounts mostly worthless.

The attaching creditors, Firebaugh and Brown, from the moment the process of garnishment was served upon him, acquired a lien upon this fund. Stone does not occupy the position of a debtor to Dyer & Robertson, but he holds the money as bailee, and without any lien express or implied in his favor upon the fund. If he had as against Dyer & Robertson, supposing there had been no assignment by them, without their consent appropriated this fund to the payment of the debts due by them to him, they could have sued him in trover and conversion, and recovered the money.

This money was a fund in Stone's hands arising from the sale of the stock of goods. The property was placed in his hands for a designated purpose—the payment of certain debts in the assignment. The authority by which he held it was declared to be invalid, by declaring the assignment to be void. He now, while admitting that it only came to his hand for one purpose (to be distributed to the creditors under the assignment), insists that he has a right to retain and hold it for his own use, and the court allows him to appropriate it in that way.

The relationship of Stone to Dyer & Robertson, as regards this money, is not the relation of debtor and creditor, but that of bailor and bailee, and on no principle can he be allowed to retain it.

Our position then is, that Stone cannot in this proceeding, of his own option, convert himself into the capacity of debtor for this money, in order to let in his debts as set-off, and that he has neither a particular nor general lien on the fund, but none whatever, and stands (the assignment being invalid) as a naked bailee of the money, and has no lien for previous debts. (Drake on Attach., § 690; Wood v. Edgar, 13 Mo. 452; 18 Mo. 277; 19 Mo. 625; 34 Mo. 432.)

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The law as applicable to factors, consignees, warehousemen, &c., allowing them a lien for general balance of accounts, has no application to this case whatever; for Stone had no more right to a lien than any other creditor.

Ewing & Muir, for defendants in error.

Whatever claim the garnishee has against the defendant, and of which he could avail himself in an action between them, will be equally available to him in the garnishment proceeding. (*Ashby v. Watson*, 9 Mo. 236; *Picquet v. Swan*, 4 Mason 443; *Drake on Attach.*, §§ 672-4, 678-9, 681, 682, 683, *et seq.*; *Beach v. Viles et al.*, 2 Pet. S. C. 678.) He may set up any defence which shows that in equity he owes no debt to the defendant. (*Glassell v. Thomas*, 3 Leigh, 113; *Williamson v. Gayle*, 7 Grat. 152; *Ross v. McKinney*, 2 Rawle, 227.)

The attaching creditor can hold the garnishee only to the extent of defendant's claim against the garnishee, and can acquire no right against the latter except such as the defendant had.

In a suit by *Dyer & Robertson* against *Stone* to recover the money in his hands, it is clear that *Stone* would be allowed by way of set-off, or counter-claim, the amount of their indebtedness to him accruing before the service of the garnishment, and in the case at bar he claims no more. As to the money in his hands, the relation of debtor and creditor exists between the garnishee and *Dyer & Robertson*. *Stone*, the garnishee, does not deny that this relation exists; but states facts showing that, after allowing the claims of prior attaching creditors and his own claim, he owes nothing to defendants. The instructions of plaintiffs in error also present this theory of the case.

The money admitted to be in garnishee's hands was the proceeds of property, &c., sold, or debts collected by him while property, and evidences of debt came to him in the assignment.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff sued Dyer & Robertson by attachment, and summoned Stone as garnishee. Stone answered stating that he had in his possession and under his control certain money, goods, effects, &c., of the defendants, by virtue of an assignment made and executed by them to him.

This assignment in another case came before this court, and it was decided to be invalid. After said decision Stone filed his amended answer, stating that at the time of the service of the garnishment, he had in his possession twenty-seven hundred dollars in United States legal tender treasury notes, and about twenty-five hundred dollars in notes and accounts, most of which were worthless, and denied that he owed defendants anything. He further stated that defendants, at the time of the service of the garnishment, owed him and still do owe him two notes, and for services rendered at their special instance and request, in about the sum of nine hundred dollars; and that he has been served with garnishment in favor of other parties prior to his being garnished by plaintiffs, and that, after deducting the amount which defendants owed him and what he was liable to pay to the elder attaching creditors, he was ready and willing to pay whatever balance there might be.

Plaintiff demurred to this answer for insufficiency, alleging that the facts therein stated constituted no legal grounds of defence, and that Stone was not entitled to retain his debt in preference to the attaching creditors. The court overruled the demurrer, and gave judgment for Stone, the garnishee, and this is now complained of as error.

In this case we are unable to perceive that any other relation than that of debtor and creditor existed between the defendants in the attachment suit and Stone. In a direct proceeding by them against him, to recover the property in his possession, or for money had and received, there is no doubt about his having a right to plead his debt as a set-off. The invalidity of the assignment is totally immaterial; it

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left him in possession of goods, money, &c., which they might have demanded, or brought an action against him to recover.

The rights of a garnishee will never be disturbed by the garnishment. Whatever claim he may have against a defendant, and of which he might avail himself by set-off in an action between them, will be equally efficient when invoked by him on a proceeding by garnishment. (*Ashby v. Watson*, 9 Mo. 236; *Beach v. Viles*, 2 Pet. 675.) It is held in an elementary work of merit, that an "attaching creditor can hold the garnishee only to the extent of the defendant's claim against the garnishee, and he can acquire no rights against the latter, except such as the defendant had; and as he is not permitted to place the garnishee in any worse condition than he would occupy if sued by defendant, it follows necessarily, that whatever defence the garnishee could urge against an action by the defendant, for the debt in respect of which he is garnished, he may set up in bar of a judgment against him as garnishee." (*Drake on Attach.*, § 672.)

The assignment having been held void and of no effect, there is no pretence that Stone occupied the position of either a trustee for the creditors, or a bailee to the debtors.

The judgment is affirmed. The other judges concur.



HUGH LACKEY, Plaintiff in Error, v. J. C. LUBKE, Defendant in Error.

Execution—Sheriff's Deed.—The deed made by the sheriff, upon a sale of land under execution, must show that the sheriff acted under a writ that was in force at the time he made the sale. When the sheriff endorsed upon an execution issued June 12, 1864, and returnable the first Monday of August, 1864, a levy made June 16, 1864, and then under the same writ made a sale on the 29th November, 1864; *held*, that no title passed by the deed. The endorsement of a levy upon the writ will not continue the execution in force, so that a sale can be made without a *venditioni exponas*. (*R. C.* 1865, p. 748, § 54.)

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Error to Crawford Circuit Court.

Ewing & Muir, for plaintiff in error.

I. The continuance should have been granted. The application and affidavit in support of it shows reasonable diligence, especially when the condition of the country is considered.

II. The depositions of Klunk and Hunt were improperly excluded.

III. The sheriff's deed was improperly excluded. (Act on Execut. §§ 49-54, R. C. 1845, pp. 484-5; *Hardy v. Heard et al.*, 15 Ark. 185-7; Rev. Stat. Ark., p. 382, § 54.) It contained all the recitals required by law. In *Tanner v. Stine* (18 Mo. 580), cited by defendant's counsel, the deed omitted a recital of the court, the term, and the year. The recital in the deed in the case at bar, as to the notice (which is the only supposed defect noticed by the opposite counsel), is full. The statement in the deed that he, the sheriff, gave twenty days' notice, &c., by handbills, *ex vi termini* import that he signed the handbills.

The deed being evidence of the facts therein recited, plaintiff was not bound to show otherwise a judgment, execution, advertisement, &c., and it should have been admitted. Any question, therefore, as to the regularity of the issue, return, &c., of the execution before the deed was admitted, defendants were precluded from raising in the court below, and cannot do so here.

IV. It is unnecessary, in this view, for the plaintiff in error to show any authority for issuing an execution from the Law Commissioner's Court to the sheriff of Jefferson county. The statute, however, gives express authority for it—R. C. 1845, Execut., p. 476, § 8; R. C. 1855, p. 737, § 8—and there is no repugnancy between these provisions and that provision of the act creating the Law Commissioner's Court directing that its process shall be executed by the sheriff or marshal; which only means (construing the two acts together) that the process to be executed in St. Louis county shall be executed by the sheriff or marshal.

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V. It is further maintained—though not necessary as the case is now presented, as we conceive—that the supposed irregularities and errors, if they really existed, are not such as could have availed the defendants, in a collateral proceeding of this kind, for any purpose. (*Landes v. Perkins*, 12 Mo. 238; *Draper v. Bryson*, 17 Mo. 71; *Reed v. Austin*, 9 Mo. 713; 16 Mo. 68.)

VI. The fact that depositions offered in evidence may contain incompetent and illegal evidence, will not justify the rejection of them altogether. The court should point out and exclude the inadmissible portions. (*Hamilton v. Scull*, 25 Mo. 165.)

A motion to exclude depositions must specify the grounds of objection. (*Chapman v. Sprier*, 10 Mo. 689; *Bank Mo. v. Merchants' Bank*, 10 Mo. 123; 15 Mo. 244; 13 Mo. 203.)

I. Z. Smith, for defendant in error.

An execution from the Law Commissioner's Court has no validity if issued to Jefferson county. The Laws of 1853, p. 95, provide that "all process issuing from the Law Commissioner's Court shall be directed to the marshal of St. Louis county, and executed and returned by him."

The court is limited in its jurisdiction as to amount, and the execution of "all" its process is limited to one officer of one county. Its jurisdiction on notes is just the same as that of justices of the peace; and on accounts, a little higher; and it was the intention of the Legislature to confine the operation of its process to the same territorial extent as those issuing from justices of the peace.

This court being one of limited and not general jurisdiction, all acts concerning its jurisdiction, and concerning the execution of its process, must be construed strictly. The Legislature, in creating this tribunal and in defining its powers, did not intend to give it any power beyond the bounds of the county.

The several acts establishing the St. Louis Court of Common Pleas (R. C. 1855, p. 1587), the St. Louis Criminal

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Court (*id.* p. 1589), and the St. Louis Land Court (*id.* p. 1592), contain no such language.

But supposing there had been a valid judgment, and the court could have given power to the sheriff of Jefferson county to execute the execution or process, the execution in this case would have had no vitality. The Laws of 1853, pp. 94 & 95, provide that this court shall have six terms a year—April, June, August, October, December, and February.

The general law provides that executions shall be made returnable to the next succeeding term, unless otherwise ordered by the plaintiff, when they be made returnable to the second term. The execution offered in evidence by plaintiff was issued June 12, 1854, and made returnable on the first Monday of August, 1854. After the first Monday of August, 1854, this execution, if it ever had any validity at all, was dead; after the first Monday of October it was undoubtedly dead, without a *venditioni exponas*, which should be recited in the deed. If the general law concerning executions is correctly applied to executions issuing from the Law Commissioner's Court, then there was no validity to the execution in question after the first Monday of August, 1854.

But another reason may be urged against the validity of the execution. The law of 1851 (p. 243) provides that all executions issuing out of the Law Commissioner's Court shall be dated the day they are issued, and returnable in sixty days. This law has never been repealed. It was a special law, applied to a single object, and cannot be repealed by any general law, unless by express terms. This execution issued on the 12th day of June, and should have been returnable on the 11th day of August. Now, if the first Monday of August was the 7th day of the month, it would make 56 days; if the 1st of the month, it would be 50 days. It was therefore not in accordance with the law, and therefore had no effect.

Plaintiff also complains that the sheriff's deed to him was excluded; but there are good reasons for its exclusion:

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I. All of the reasons for the exclusion of the execution and return are reasons for excluding the deed. The deed was based upon the execution; if that was worthless, the deed must be.

II. Admitting, 1st, that there was a judgment; 2d, that the court could issue its process to Jefferson county; 3d, that the execution was made returnable at the proper time; and, 4th, that it had validity and life after the return day—then it carried no title, for the reason that it is defective in its recitals.

The Laws of 1845 (R. C. 1845, p. 484) provide for the recitals in a sheriff's deed, and (p. 483) what the advertisement shall contain.

LOVELACE, Judge, delivered the opinion of the court.

When this case was called for trial, the plaintiff filed an affidavit asking for a continuance on the ground of the absence of material witnesses and on account of the absence of counsel; he gives the names of the witnesses and their place of residence, showing that they reside over forty miles from the place of trial, and sets out what he expects to prove by the witnesses, and that he has made some exertion to get their depositions; that he had given notice to take their depositions on the 17th day of April, (the trial came on the 24th,) and that he had notified the witnesses to appear at the time and place designated in the notice, and that the witnesses failed to appear; that he believed he could procure the evidence by the next term of the court, if the continuance were granted. The court overruled the motion for a continuance and the defendant excepted, and the trial proceeded, and the plaintiff offered certain evidence (which will be more fully alluded to hereafter), which was excluded by the court, and the plaintiff took a non-suit with leave to move to set the same aside.

The plaintiff then filed a motion to set aside the non-suit, for the reasons the court refused to grant a continuance, and had improperly excluded evidence offered by the plain-

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tiff; and his motion to set aside the non-suit being overruled, he excepted, and now brings the case here by writ of error.

There was no error in refusing the motion for a continuance; such motions are very much within the discretion of the *nisi prius* courts; they understand the facts much better than they can be understood here. Besides, the record shows that this suit was commenced in 1857, and was not disposed of until April, 1863; it had been continued several times at the application of the plaintiff, and no good reason is shown why the depositions of these witnesses were not taken sooner. After the application for a continuance was overruled, the trial proceeded.

To show the plaintiff's right to maintain the action and have the defendant's deeds set aside, he offered in evidence an execution issued by the Law Commissioner of St. Louis, dated the 12th day of June, 1854, and directed to the sheriff of the county of Jefferson, reciting that Hugh Lackey, on the 21st day of April, in the year of our Lord one thousand eight hundred and fifty-three, at the Law Commissioner's Court of St. Louis county, recovered against John Schrieber the sum of one hundred and sixty-three dollars and fifty cents for his debt, together with forty-one dollars and forty-five cents for his costs and charges in said suit expended; and commanding the officer, that of the goods, chattels and real estate of the said John Schrieber he cause to be made the said debt and costs, and that he have the said writ before the Law Commissioner's Court on the first Monday of August then next following: upon which execution is endorsed a levy on the 16th of June, 1854, of the real estate in controversy, and also a return of the sale to the plaintiff on the 29th day of November, 1854. And the plaintiff offered in evidence a sheriff's deed from the sheriff of Jefferson county to Hugh Lackey, the plaintiff: the deed contains the same recitals as the execution; it also recites the levy, the advertisement—that he gave at least twenty days' notice of the time, terms and place of sale, and of the real estate to be

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sold, as the law directs, by six handbills put up in public places in different parts of Jefferson county; it then states how the land was sold, and that it was purchased by Hugh Lackey, and contains the ordinary terms of conveyance by the sheriff to Lackey. The introduction of this deed and execution was objected to by the defendant, and the objection sustained by the court, to which ruling the plaintiff at the time excepted.

The plaintiff also offered in evidence two depositions, which were objected to by defendant, and the objection sustained by the court, to which the plaintiff excepted. The objection to the deed and execution being the same, they will be considered together.

The well established rule is, that a sheriff's deed must contain recitals which are required by the statute, (*Tanner v. Stine*, 18 Mo. 580,) and that he made it in accordance with law; that is, the deed must show that the sheriff acted under a writ that was in force at the time he made the sale. In this case the execution was issued by the Law Commissioner of St. Louis, and dated the 12th day of June, 1854, and returnable on the first Monday in August, 1854; and the land was not sold until the 29th November. The rule on this subject is, that a writ must be returned according to its tenor, unless the statute will authorize the officer to hold it up and execute it after the return day. On this subject the statute has been referred to—R. C. 1855, p. 748, § 54: that section provides, "that in all cases where an execution shall be issued and levied by the proper officer upon real estate, and, for any cause, a sale of such real estate, without the fault of the officer, cannot be made at the first term of the court of the county in which such sale is to be made, the execution shall continue in force until the end of the second term of the court of the county to which such writ is directed, and the officer shall in all such cases proceed to advertise and sell the real estate according to law."

This section evidently goes upon the idea that the execution would be in force at the first term, and then if, without

any fault of the officer, no sale is made, the execution is continued in force to the next term. This construction is also borne out by the 5th section of the same act, which provides that "executions issuing from any court of record shall be made returnable at the next succeeding term thereof, unless the plaintiff, or person to whose use the suit was brought, shall direct otherwise; then it shall be the duty of the clerk issuing the same to make it returnable to the second succeeding term thereof." If the mere endorsement of a levy on the back of an execution would keep it alive, this section would be unnecessary; for the sheriff could endorse the levy on the back of the execution on the same day it is issued. But what effect has a levy on real estate, or, in other words, the mere endorsement on the execution, that the sheriff has levied it on certain real estate? It is not felt by the defendant—it is, perhaps, not even known by him—until the land is advertised for sale; and it has not unfrequently been held, that no levy need be endorsed on the execution at all. But in personal property it is different; the levy is the taking of the property into actual possession by the officer. The mere endorsement of the sheriff, that he has levied the execution on real estate, could hardly continue the execution in force until the property could be sold without a *venditioni exponas*.

The whole theory upon which the 54th section is based, is that the execution will be in full force at the first term of the court, and then if, without any fault of the officer, it is not sold, the execution will be continued in force until the next term; but, by examining the different acts in relation to the Law Commissioner's Court of St. Louis, it will be seen that this execution had run for a greater time than that allowed for two executions before any sale was attempted. In 1851 (Sess. Acts 1851, p. 241, § 1) the Law Commissioner's Court of St. Louis county is declared to be a court of record, and by the 10th section of the same act (p. 243) it is provided, that any execution issued by said Commissioner's Court shall be dated on the day it is issued, and shall be returnable in sixty days from its date. At this time, the

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Law Commissioner's Court was declared to be in session during the whole year, Sundays excepted; but in 1853 (Sess. Acts 1853, pp. 94-5) it is enacted, that there shall be six terms of the Law Commissioner's Court held in each year in the city of St. Louis, commencing on the first Mondays in April, June, August, October, December, and February.

Now, it is only by construction of this last statute that executions issued from the Law Commissioner's Court are made returnable at the next term of the court, instead of within sixty days, according to the act of 1851; and if the act of 1851 were still in force, this execution would be absolutely void upon its face. (*Stevens v. Chouteau*, 11 Mo. 382.) But courts of record are required to make their writs returnable in term time, and under this general provision it is insisted that the Law Commissioner's Court, after it was made a court of record and regular terms established, should make its writs returnable like other courts. But it is a court of very limited jurisdiction, and the fact that its terms follow each other in such quick succession shows that its jurisdiction was intended chiefly to be confined to the city and county of St. Louis; and if parties see proper to carry its writs to other counties, it is no great hardship on them to require them to take the necessary steps to keep the writs alive by *venditioni exponas* until they are fully executed.

The execution, then, in our opinion, issued on the 12th day of June and returnable on the first Monday of August, could give the sheriff no power to sell on the 29th day of November; so that the recitals in the deed, instead of showing that the sheriff had power to make the sale, show that he had no power whatever, and this the purchaser was bound to know at his peril. It is not like a defect in a judgment, for in that case the sheriff, if the execution is regular, has authority to make the sale even though the judgment may be so defective as to be void; and the purchaser will acquire a good title, because he is not bound to look back to the judgment; but it is no hardship to require him to see that the

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sheriff is acting under a good and valid writ, issued by a court of competent jurisdiction.

It would hardly be contended, if a sheriff should sell a piece of land under an execution issued by a justice of the peace, that thereby passes any title, or if he should sell without any writ at all; and there is no difference in selling without a writ and selling under a writ after it has ceased to have any force, as was the case at bar. And if the recitals in the deed fail to show the authority under which the sheriff acted, or if, as in this case, the recitals show that he acted without authority, then the deed ought not to be read in evidence.

The case of *Hardy v. Heard et al.* (15 Ark. 185) only shows what the recitals in a sheriff's deed prove when introduced. The objection in that case was, that the plaintiff had failed to support the sheriff's deed by introducing the judgment and execution. The statute of Arkansas in relation to sheriff's deeds is an exact copy of our own (Stat. Ark., p. 382, § 54), and in *Hardy v. Heard* the court say, after alluding to the recitals in the deed then before them, "a deed not containing the recitals mentioned in the statute, or not showing on its face a compliance with the law, could not be evidence under the statute"; and in the case at bar the recitals fail to show the great object for which they were intended—the power of the sheriff to pass the title from Schrieber to Lackey. We can see no error in excluding the deed.

The deed being rightfully excluded, the depositions become a matter of no importance. Without the deed the plaintiff had no standing in court, and excluding the depositions, whether rightfully or wrongfully, did him no harm, and it therefore becomes unnecessary to investigate them. Upon examination of the depositions, however, we have failed to find any material evidence in them. The plaintiff was rightfully out of court for one good reason, and that was enough.

The other judges concurring, the judgment is affirmed.

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI,

AUGUST TERM, 1865, AT ST. JOSEPH.

CORNELIUS DAY, Appellant, v. JOHN W. AND JESSE BAKER,
Respondents.

Notes—Stamp—Evidence.—Under the act of Congress of March 8, 1863, a note executed before June 1, 1863, is admissible in evidence if the proper stamp be affixed before it is thus offered.

Appeal from Buchanan Court of Common Pleas.

H. M. & A. H. Vories, for appellant.

Ensworth and W. Jones, for respondents.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff sued defendants, in the Court of Common Pleas for Buchanan county, on a promissory note, dated March 9, 1863, for the sum of three hundred dollars, due and payable thirty days after the date thereof. He alleged in his petition that, at the time of the execution of the note, neither he nor the defendants knew what denomination of revenue stamp was required to be attached to said note in accordance with the revenue laws of the United States, but that it was agreed

*see 47 Ill
97 Mass
where it
is held that no
stamp is nec-
essary to make an
instrument receivable
in Cr.*

that the stamp might be put upon the said note when the amount was ascertained. Plaintiff then averred that, before suit was brought, he attached a government stamp on said note (which is admitted to be of the proper denomination), and requested defendants to cancel the same by writing the initials of their names and the date thereon, which they refused to do. Defendants answered, admitting the execution of the note, but denied that any agreement was made about attaching a stamp to the said note or cancelling the same. They also alleged as a defence to plaintiff's cause of action, that the note was void because no stamp was affixed thereto, as provided by law of Congress approved July 1, 1862.

Before any trial was had, all the original papers together with the note were lost, and they were substituted in court. Neither party requiring a jury, the cause was submitted to the court. Plaintiff proved that about two months after the execution of the note he placed a revenue stamp of the proper amount thereon, and presented the same to defendants and requested them to cancel it, which they refused to do. No other evidence was offered or introduced in the cause. The court found for defendants. The plaintiff duly excepted and appealed.

The court below clearly misapprehended the law governing the case. The act of Congress of July, 1862, did make void all instruments requiring a stamp, where the party neglect to affix one according to its provisions; but this case does not come within its operation. By the law of Congress approved March 3, 1863, amendatory of the act of 1862, it is provided in section sixteen, "that no instrument, document, or paper, made, signed or issued prior to the first day of June, A. D. 1863, without being duly stamped, or having thereon an adhesive stamp, to denote the duty imposed thereon, shall, for that cause, be deemed invalid and of no effect: *And provided*, that no instrument, document, writing, or paper, required by law to be stamped, signed, or issued, without being duly stamped prior to the day aforesaid, or

any copy thereof, shall be admitted or used as evidence in any court until a legal stamp, or stamps, denoting the amount of duty charged thereon, shall have been affixed thereto or used thereon, and the initials of the persons using or affixing the same, together with the date when the same is so used or affixed, shall have been placed thereon by such person. And the person desiring to use any such instrument, document, writing, or paper, as evidence, or his agent or attorney, is authorized, in the presence of the court, to stamp the same, as heretofore provided by law."

As regards this controversy, by the terms of this act it took effect from and after its passage, and all acts and parts of acts repugnant to, or inconsistent with, its provisions were repealed. It is unnecessary to notice the argument advanced by respondents' counsel, that, because the law had previously declared unstamped instruments of this description invalid, Congress had no constitutional right to afterwards pass an act to give them force and effect. It is sufficient to say, that no such question can here arise. The amendatory act of March 3, 1863, was in full force at the time the note was made and executed, and the contract was governed entirely by its provisions; the law of 1862 never applied. Now, by the said sixteenth section above cited, instruments, documents, notes, &c., made prior to June, 1863, were not invalid by reason of not having a stamp affixed to them, but before they could be used in evidence it was necessary to attach a stamp or stamps thereon. And the person holding such instrument, or desiring to use it in evidence, was authorized to place the stamp on the same, and cancel it by writing thereon his initials. From a fair and just construction of the law, this could have been done at any time, either before suit brought or afterwards; but, out of abundant caution, to guard against surprise, inconvenience, or hardship, the last clause of the section permits the party, his agent or attorney, even at the time of trial, to affix the stamp in the presence of the court.

All will admit that this law was conceived in a spirit of

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justice and liberality. Previous to the rebellion, the Government always had ample revenue without resorting to anything like a stamp duty. The vast expenditures required to maintain our military and naval forces, rendered it necessary to devise new means of raising revenue. It was some time before the people could become well acquainted with the practical workings of the new system, or even procure the necessary stamps; hence a rigid adherence to the original law of 1862 would have worked manifest injustice, and therefore the enactment of the amendatory law. The great object of the law is to raise revenue, not to invalidate contracts or inflict penalties; and courts should be liberal, in carrying out and construing it, to further the ends of justice, where it has not been clearly violated.

It does not appear whether the appellant cancelled the stamp after the refusal of the respondents to cancel the same. No notice was taken of this, on the argument by either party. The cancellation was necessary, but it could be done when offered in evidence on the trial. The respondents here seek to avoid their obligation, without showing any meritorious defence.

The judgment is reversed and the cause remanded. The other judges concur.

MARY ANN KENNEDY, Plaintiff in Error, v. ANDREW BURRIER,
Defendant in Error.

Damages—Limitations.—Suits for damages under the 2d section of the "Act for the better security of life," &c. (R. C. 1855, p. 647), must be commenced within one year after the cause of action accrues. If the wife of the deceased fail to sue within six months, the minor child has not twelve months thereafter within which to sue.

Error to Buchanan Court of Common Pleas.

Parker, Strong & Chandler, for plaintiff in error.

H. M. & A. H. Vories, for defendant in error.

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LOVELACE, Judge, delivered the opinion of the court.

This is an action brought by the plaintiff to recover damages under "An act for the better security of life, property and character," for the alleged wrongful killing of her father. The petition shows that the killing took place more than one year before the institution of the suit; and that the deceased left a widow, the mother of the plaintiff. The defendant demurred upon the ground that the suit was not brought within one year after the cause of action accrued, which was sustained by the court below and judgment entered up for defendant, to reverse which the case is brought here by writ of error. The second section of the statute under which these proceedings were instituted (R. C. 1855, p. 648, § 2), after declaring in what kind of cases an action may be brought for the wrongful killing of another, provides that the suit shall be brought, "1. By the husband or wife of the deceased; or, 2. If there be no husband or wife, or he or she fail to sue within six months after such death, then by the minor child or children of the deceased," &c. And the sixth section of the same act provides, that "every action instituted by virtue of the preceding sections of this act shall be commenced within one year after the cause of action shall accrue." The plaintiff contends that for the first six months after the killing of Kennedy, there being a widow, no cause of action accrued to the plaintiff, and that she has one year after her cause of action accrued, and cites *Coover v. Moore*, (31 Mo. 576,) in support of this position.

In *Coover v. Moore*, the suit was brought by the widow to recover damages for the killing of her husband. It appeared that the deceased had minor children, and the widow commenced her action more than six months after the death of her husband. The court in that case held that when there were minor children, the right of the widow to sue would be barred after six months, and that after six months the cause of action "accrues to the minor children." The question as to when the minor children would be barred was not before the court, nor did they express an opinion upon it.

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The sixth section of the act provides that suit must be brought "within one year from the time the cause of action accrued." When, then, did the cause of action accrue? We think the cause of action accrued whenever the defendant's liability became perfect and complete. Whenever the defendant had done an act which made him liable in damages, and there was a person *in esse* to whom the damages ought to be paid and who might sue for and recover the same, then clearly the cause of action had accrued as against him. When, then, did this liability take place? Evidently at the death of Kennedy. The defendant at that time had done the whole wrong complained of, and there was a person *in esse*—to-wit, Kennedy's widow—entitled to receive and empowered to sue for the damages. Then the cause of action clearly accrued at the death of Kennedy, and the statute commenced running from that time. The fact that the right to the damages, and consequent right to sue for them, at different times, is vested in different individuals, can make no difference as to the time the cause of action accrued.

There is but one cause of action, and that accrues to the husband or wife under the statute, and, in default of his or her suing, it passes to the minor children; just as the right to sue on a promissory note passes from the intestate to the administrator. It is the same cause of action all the time. It accrued when the defendant's liability was complete, which in this case was at the death of Kennedy; and the statute necessarily commenced running at that time.

The other judges concurring, the judgment is affirmed.

ABRAM NAVE, Plaintiff in Error, v. WM. K. RICHARDSON *et als.*, Defendants in Error.

Note—Protest—Endorsers—Evidence.—To secure the liability of the endorsers of a bill of exchange, or negotiable promissory note, demand of payment must be made of all the makers, and notice of demand and refusal must be given to the endorsers. A notary's protest, which stated "that he pre-

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sented the same at the office of the makers and was refused payment," without stating from whom payment was demanded, does not show a proper demand and refusal of payment. In a suit against endorsers, such protest may be properly excluded as evidence. A demand of payment may be made by the holder of the note or bill, or any agent for him.

Error to Buchanan Court of Common Pleas.

H. M. & A. H. Vories, for plaintiff in error.

Bassett & Lawson, for defendants in error.

HOLMES, Judge, delivered the opinion of the court.

The holder sued the endorser upon a negotiable promissory note, of which the firm of Likens & Boyd and John H. Likens were the makers. On the trial, the plaintiff offered evidence proving the endorsement and transfer of the note to him, and the note was read in evidence. He then called as a witness Robert Boyle, who testified that he was the notary mentioned in the notarial protest which was shown to him, but that he had no remembrance of the manner of the protest, or of the time of day when he protested the note, other than what appeared by the protest itself and his notarial record, which were in substance the same; that he had no remembrance of serving notice of protest on the defendant, but that his custom was to search in the city for parties to whom notice of protest was to be given, and if he could not find them, then he put the notices in the post-office; and "that Likens & Boyd and John H. Likens were partners," and had a business office in the city of St. Joseph.

The plaintiff then offered in evidence the notarial protest for the purpose of showing that the note had been duly protested for non-payment. In relation to the presentment, demand and refusal of payment, the protest stated merely that the notary "presented the same at the office of Likens & Boyd and was refused payment."

The defendant objected to the admission of the paper in evidence, and it was excluded by the court. Thereupon the plaintiff took a non-suit with leave to move to set the same

aside, and his motion being overruled, he brings the case up by writ of error.

The correctness of the ruling of the court in excluding the notarial protest, is the only question presented for determination. The matter to be proved was, that the note had been duly protested for non-payment, that is, the dishonor of the note. This main fact would consist of three elements: a presentment to the makers for payment, a demand of payment, and a refusal of payment; all which the notarial protest must show, otherwise it will contain no evidence which is competent to go to the jury on the main fact to be proved. And the first question is, whether it shows a presentment to the makers. The statement is that he presented the note at the office of Likens & Boyd, and was refused payment; no more. It is not stated that the note was presented to John H. Likens, nor that John H. Likens was the "Likens" named as one of the firm. Even if it might be inferred that the presentment was made during business hours, it would certainly be an unwarrantable assumption either that John H. Likens was there present, or that he was the person named as one of the firm. A presentment to a clerk at the office, or to either partner, would be sufficient for the firm doing business under the style mentioned in the protest; but it can scarcely be imagined that a presentment to a clerk, or to the partner Boyd, at the office of the firm, one of the makers, could be a presentment to John H. Likens, the other maker, when it does not appear by anything contained in the protest itself, either that he was present there, or that he was a member of the firm; nor do we think it could be presumed, if made certain that the partner Likens was present, that he was the same person as John H. Likens. It was proved by other testimony, indeed, that John H. Likens was a member of the firm; but that cannot help the instrument—the sufficiency of which alone, and its admissibility as evidence of a presentment, and a dishonor of the note by both makers, are now in question.

It would seem to be clear, that the paper did not purport

to state a presentment to John H. Likens in any manner. The authorities are decisive, that a presentment must be made to all the makers; otherwise it is not a valid presentment to charge an endorser. In such case, the dishonor of the bill or note is not proven. (Sto. Prom. Notes, § 239.) It is not necessary that the presentment and demand of payment should be made exclusively by a notary. The notary is merely the agent selected by the holder for that purpose, and the statute makes his notarial protest evidence of what it contains in relation to the demand and refusal, and the time, place, and manner of it. The holder might have selected any other agent, or presented it himself in person, and then proved the fact by any competent witness. He chose to do it by the notary. The notary is a competent witness, but his memory fails him, and he cannot prove the fact. The plaintiff is compelled to rely upon the notarial protest; but that, like the memory of the witness, fails to show the fact to be proved—the dishonor of the note. He then proposes to show by the protest, a part of the circumstances which are necessary to make up full proof, and to make out the rest by other evidence, and he insists that the instrument shall be admitted as evidence as far as it goes.

But from the very nature of the case this instrument is either admissible in evidence as such, or it is not. The statute makes it evidence of a demand and refusal as therein stated only. A notarial protest is evidence of a demand and refusal to pay a bill of exchange, or negotiable promissory note, at the time and in the manner stated in such protest (R. C. 1855, p. 298, § 20); and this may be considered as placing the protest upon the same footing as the protest of a foreign bill under the law merchant as to its admissibility and effect as evidence; but if the protest do not show a sufficient presentment, demand, and refusal of payment, to amount to a dishonor of the note, it is nothing to the purpose. If one material element be omitted, or not stated, the instrument comes short of being proof of the fact to be proved, and it must be wholly excluded.

This question was distinctly decided, and this principle laid down, in *Musson v. Lake*, (4 How. U. S., 273.) If it do not amount to any proof of the main fact, the dishonor of the note, it is not to go to the jury as even *prima facie* proof or any kind of presumptive evidence; it is no evidence, and therefore inadmissible.

Another question is, whether this protest contains any sufficient statement of a demand of payment. There is no such statement in any express words; it is not stated at all, unless it can be considered as impliedly contained in the expression, "and was refused payment." From what has been said it must be taken here as settled, that no demand of John H. Likens is even impliedly asserted in it, for there could have been no demand of him without a presentation to him for payment. On this a strong presumption would certainly arise, that a demand had in fact been previously made. But a notarial protest must state facts, and not merely presumptions of facts. If it were proper to be left to a jury, they would be very likely to infer from a statement of a refusal of payment, that payment had been demanded. The real question is, whether the statements are such as can be permitted to go to a jury at all. The notarial protest is a statement resting on the faith and credit due to a public officer, and it speaks as a witness not under oath. The statute which makes it evidence here, uses the words *demand* and *refusal*, both. It is said that the material part of the whole thing is "the making of the demand." (Davies' Abr. Bills of Ex., art. 11, § 2.)

In *Musson v. Lake*, it is held that the protest "must set forth the presentment, demand, and refusal of payment," and that "a presumption cannot be substituted for proof in violation of the rules of evidence;" and again, that, "without the word presentment and demand also, the plain meaning of the statute cannot be carried into effect: and the circumstances of the demand are the presentment, the place where the presentment and demand is made, and the person to whom or of whom it is made, and the answer made by

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such person." In this protest here, we have the presentment, the day and place of the presentment, the maker to whom presented, and his answer, the refusal of payment; but no statement at all of any demand made, which was the principal thing to be done and stated. In *Musson v. Lake*, it seems the protest contained no express statement of a presentment or demand, but of a refusal of payment only, and the instrument was held "not to be evidence of the dishonor of the bill."

It was decided in *Wolf v. Lauman* (34 Mo. 575), that a verdict would not be set aside because a notice of protest had been admitted in evidence which did not state that a demand and refusal had been made; but the notice to endorsers being merely for the general purpose of informing the endorsers of the dishonor of the note, rests on somewhat different principles. Verdicts are sometimes aided by the statute of jeofails, but there is no statute to cure a defective protest, nor is there any principle of law, that we are aware of, that can supply omissions of material evidence. No case has been cited, nor any authority produced, which would warrant us in holding this protest to be admissible evidence to prove a demand of payment. We are of opinion that the instrument was no evidence of a dishonor of the note, and that it was rightly excluded.

The judgment will be affirmed. The other judges concur.

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JAMES C. KARNES, Appellant, v. LABAN PRITCHARD, GARNISHEE, &C., Respondent.

1. *Attachment—Garnishee—Execution.*—The defendant in the execution stands to the garnishee in the relation of creditor to debtor; and the plaintiff in the execution, in order to recover, must prove the indebtedness in the same manner as the defendant would be compelled to do had he sued the garnishee.
2. *Justices' Courts—Garnishee.*—The garnishee in an execution from a justice of the peace answering, "that he was indebted to the defendant, but could not then state the amount due, as he had a set-off," was allowed time to file an additional answer; held, that allowing time was within the discretion of the justice.

86	135
129	104
86	135
88	173

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*Appeal from the Buchanan Court of Common Pleas.**Parker, Strong & Chandler*, for appellant.*W. Jones*, for respondent.

LOVELACE, Judge, delivered the opinion of the court.

This is an action to charge the defendant as garnishee on an execution in favor of this plaintiff and against one Joseph Hill. The proceedings were originally had before a justice of the peace; and on the 19th November, 1863, the defendant, in answering the interrogatories, said, "I am indebted to the defendant Joseph Hill in the sum of one hundred and ten dollars, which will be due on the twenty-fifth of December, A. D. 1863. By the terms of the contract with the said Hill, I am to pay a part of the rent of said place in repairs and taxes. I am not able at this time to ascertain the exact amount which will be due the said Hill in money, but I will be able to state the exact amount which will be due said Hill on the 25th of December, 1863."

On the 4th of February, 1864, the defendant files a further answer, in which he says, that at the time of the service of the garnishment he did not have any property, money or effects in his hands, or under his control, belonging to defendant; and further says, that at the time of the service of the garnishment he was indebted to the defendant in the execution in the sum of eighteen dollars and seventy-six cents, which was all that he then was then indebted to the said Joseph Hill. The complaint is that the court ought to have disregarded the second answer and given judgment on the first. Although the first answer purports to be an answer to the garnishment, it seems to us more in the nature of an affidavit asking for further time to answer. It states that the garnishee cannot arrive at the exact amount which he owes the defendant in the execution until the 25th day of December, then next following; and although the record is perfectly silent on the subject, it would seem that the time was granted and a continuance had in the cause, for on the

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4th February, 1864, he is permitted to file an additional answer, which forms the basis of the judgment; and in this we are not prepared to say the justice erred. Justices' courts have considerable discretion in permitting parties to amend their proceedings, and it does not appear that the justice went beyond his discretionary power in this case. (See R. C. 1855, p. 945, § 36.) And if it was proper to admit the amended answer at all, then the case must be tried upon that answer. And the relation of the parties to each other are exactly the same as though the defendant in the execution had been suing the garnishee for his debt—the plaintiff occupying the place of the defendant in the execution. Then it follows that the denial of the garnishee of indebtedness to the defendant in the execution in any moneyed demand gives him a *prima facie* case, and the plaintiff, in order to recover, must prove such indebtedness; just as the defendant in the execution would have been compelled to do had he sued the garnishee for his debt. In other words, the garnishment cannot operate to change the rights of the parties. The defendant ought to be placed in court on the same terms that he would have been had he been sued by his own creditors; and in that case it would have been incumbent on the creditor to prove his claim, and in this case it ought to be required of the plaintiff to prove the indebtedness. It is true that the first answer or affidavit was competent evidence to go to the jury, or the court sitting as a jury, to prove indebtedness; but it is not the province of this court to say what particular right is to be given to an item of evidence; that is the province of the triers of the fact, and they having passed upon it, it would be contrary to the practice of this court to disturb their finding.

The other judges concurring, the judgment will be affirmed.

STATE OF MISSOURI, Defendant in Error, v. JOSEPH ROGERS
et al., Plaintiffs in Error.

1. *Evidence—Presumption—Courts.*—All proper presumptions will be indulged in favor of the judgments of courts of record, and they must appear clearly erroneous before they will be disturbed.
2. *Criminal Practice—Recognizance.*—Where a recognizance is taken by a judge who has authority to take such recognizance for the appearance of the party before the Circuit Court, it will be presumed that the necessary preliminaries were complied with, and that the proceedings were regular and proper.

Error to Linn Circuit Court.

Lander, for plaintiff in error.

WAGNER, Judge, delivered the opinion of the court.

The only question presented in this case, is as to the validity of the recognizance. The record is certainly very imperfect. It appears that Rogers was arrested in Linn county for larceny, and taken before a magistrate, where he confessed the crime whereof he stood charged. The magistrate committed him to jail, but it does not appear of record whether he was actually received by the jailor or not. Afterwards he appeared before Judge Smith, judge of the judicial circuit in which Linn county is situated, and entered into a recognizance with the plaintiff in error (Brownlee as security) in the sum of five hundred dollars, conditioned that he, the said Rogers, would appear at the next term of the Linn county Circuit Court to answer to an indictment to be preferred against him for "horse stealing," and not depart the same without leave, &c. This recognizance was among the papers in the cause, but not marked "filed." An indictment was regularly returned by the grand jury against the prisoner, who did not answer when called, but made default. The recognizance was then duly prosecuted to forfeiture, and a *scire facias* issued thereon.

At the return term of the *sci. fa.* the plaintiff in error Brownlee appeared and filed his demurrer, alleging as his

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principal objections, that the principal (Rogers) being committed to jail by the justice, it did not appear of record, or otherwise, that said Rogers was ever discharged from the jail; that the recognizance was not filed in the office of the clerk of the Circuit Court; and that the writ does not show that he was charged with any offence known to the law. Other points were made, but they require no particular notice.

The court overruled the demurrer, and gave judgment for the State. The record shows enough to justify us in presuming that Judge Smith acquired jurisdiction, and that the prisoner was regularly released from jail on *habeas corpus*, and that the jailor, in all probability, in making his return to the writ, kept it, instead of delivering it over and filing it with the papers in the clerk's office. It is shown that the justice issued his mittimus ordering him to be sent to jail on the 18th day of March, 1863; that he was brought before the judge and entered into recognizance on the 8th day of April thereafter; and that on the 17th day of the same month the grand jury returned their indictment into court, and that he, being then called, came not.

The conclusion from these facts is irresistible, that he was committed to jail; that he was released from jail when he entered into recognizance; and his actual default fully appears of record. Under these circumstances, we think we are abundantly justified in presuming that all the necessary steps were complied with, and the proceedings were regular and proper. All proper presumptions will be indulged in favor of the judgments of the Circuit Courts, and they must appear clearly erroneous before they will be disturbed. It has been argued here that there is nothing to show that Rogers, the prisoner, was taken before Judge Smith to be recognized. The recognizance, as embodied in the record, states explicitly that both he and Brownlee appeared before the judge and executed the same. Bronson, Ch. J., in delivering the opinion of the Supreme Court of New York, remarks: "When the recognizance has a condition to do some act, for the doing of which such an obligation may be

properly taken, and the officer before whom it was acknowledged had authority by law in cases of that general description, I think the recognizance is valid although it does not recite the special circumstances under which it was taken; and in declaring upon such a recognizance, I do not think it necessary to aver the existence of the particular facts which prove that the officer had authority to take it."

There is an obvious distinction between cases where a charge or burden is attempted to be fastened upon a party by a proceeding *in invitum*, and those where the charge or burden springs from his own voluntary act. (People v. Kane, 4 Denio, 531.) With us no formal declaration is filed in proceeding on a recognizance, as is the practice in New York and some of the other States; but the *scire facias* issues at the instance of the prosecutor, and the demurrer reaches not only to the writ but to the whole record. And it sufficiently appeared that there was an apprehension of the party, that he confessed his guilt and was committed to jail; that he was afterwards recognized, and that he made default when indicted. This objection is therefore purely technical, and we will not say that it follows as a consequence that the whole proceeding is void.

But it is not easy to perceive how the plaintiff in error is injured by the decision of the court. The entering into the recognizance was not *in invitum*, but his own voluntary act, by which he freely and voluntarily acknowledged that he owed and stood indebted to the State in a certain sum, providing the prisoner did not make his appearance at court and answer an indictment to be preferred against him; the prisoner did not make his appearance; the recognizance was declared forfeited and the plaintiff in error adjudged to pay his part. This is in precise accordance with his contract. The recognizance was placed among the papers in the cause, and the failure to mark "filed" on the same was evidently a mere omission of the clerk. It ought not to be regarded as a fatal defect. It would have been perfectly competent for the court to have ordered it filed *nunc pro tunc*.

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In examining the record we cannot concur in the position taken, that the recognizance does not show that Rogers was charged with any offence known to the law. It may be a bad description, but it is certainly sufficient; technical precision is not here required. The recognizance is in the usual form, binding the prisoner to appear in court to answer an indictment to be preferred against him, and not depart the same without leave, &c. He was therefore bound to appear, not only to answer the specific charge for which he was committed, but all others which might be preferred against him. (*People v. Sterger*, 10 Wend. 481; *Champlain v. The People*, 2 Comst. 81; 2 Hawkins' Pl. Cr., ch. 15, § 84.)

The result is the judgment must be affirmed. The other judges concur.



EDWARD R. GEORGE, Respondent, *v.* THOMAS E. TUTT *et als.*,
Appellants.

Practice—Judgment—Injunction.—A defendant in a suit who has been properly served with process, and has failed to appear, cannot enjoin the judgment entered against him, unless he show not only that it is inequitable to execute such judgment against him, but also that he could not have availed himself of his defence at law, or that he was prevented by fraud or accident, without any fault or negligence on his part.

Appeal from Buchanan Court of Common Pleas.

Ensworth, H. M. & A. H. Vories, for respondent.

Jones, Owen and Ringer, for appellants.

WAGNER, Judge, delivered the opinion of the court.

The respondent filed his petition in the Court of Common Pleas for Buchanan county, to restrain the appellants from proceeding to collect a judgment, which they had obtained at law in said court against him and one Thornton S. George. The court granted a temporary injunction, and on a final hearing of the cause made it perpetual. The facts

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appear that the appellants brought their suit against the two Georges in the spring of 1861, in the above named court; that process was duly issued and served, and that at the November term thereafter of said court judgment was rendered by default in favor of appellants and against the respondent. No appearance or defence was made to the action.

Respondent alleges in his petition, that he had a good and valid defence to the note on which the judgment is founded, and that he was precluded from attending the November term of court on account of the intense excitement then prevailing in the country, and that it was dangerous to travel from home. He also states that it was generally understood there would be no court at that time, and that the judge of the court had said that he would hold no session for the trial of cases. Evidence was introduced tending to prove these facts; but it is unnecessary to review it here. No principle is better established, than that a party seeking to be relieved by injunction against a judgment at law, must show that it is not only against conscience to execute such judgment, but that he could not have availed himself of his defence at law, or that he was prevented by fraud or accident, without any fault or negligence in himself or agents. (2 Sto. Eq. Jurisp., § 887; 7 Cranch, 382.)

There is not a single ingredient in this case entitling the respondent to equitable relief; he had full opportunity to avail himself of any defence he had against the note, at law. He neither appeared at the return term, nor at the next term thereafter, at which term judgment was taken. The excitement existing in the country in the fall of 1861, was no valid excuse; more than six months had elapsed from the time the summons was regularly served on him, and yet it seems he had not even employed counsel to appear in his behalf. It was not essential that he should have been present in court in person; he could either have filed his answer in vacation, or instructed his attorney to obtain further time to answer. Under these circumstances, can it be said that he was

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without fault, or not guilty of negligence? The remarks of the judge made out of court, that he would hold no term for the trial of cases, furnish no ground for relief. There was nothing inconsistent in his declarations with his action in rendering judgment. The language referred to cases that were litigated, and there was nothing to show that there was any contest in regard to the suit out of which this action arises. It was a note on which plaintiffs were entitled to judgment at the first term; no answer was filed, and no counsel appeared to defend; judgment was therefore rendered as a matter of course; and if any injury resulted to respondent, it is justly imputable to his own gross and culpable negligence. When a party is served with process, he is immediately put upon inquiry, and it is his imperative duty to use strict diligence in preparing for his defence. If he fails in this, he has no claims to the interposition of equitable relief. We can hardly conceive of a case presenting less equity than the one here.

The judgment is reversed and the cause remanded, with direction to the court below to dismiss the petition. The other judges concur.



JOHN J. HUNTER, Appellant, v. SAMUEL T. MILLER *et al.*,
Respondents.

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1. *Practice—Instructions.*—In chancery cases, it is not necessary to present the questions of law arising on the case by instructions.
2. *Practice—Error.*—Where the judgment is manifestly for the right party, the judgment will not be reversed for errors not affecting the merits of the case.

Appeal from Gentry Circuit Court.

Ensworth, for appellant.

H. M. & A. H. Vories, for respondents.

LOVELACE, Judge, delivered the opinion of the court.

This is an action brought by John J. Hunter, the plaintiff,

to set aside a deed executed by Samuel T. Miller to William R. Miller, upon the ground that the deed was made to defraud the creditors of Samuel T. Miller. The petition charges that the defendant Samuel T. Miller, being in failing circumstances, fraudulently combined and confederated with the defendant William R. Miller to cheat and defraud the creditors of Samuel T. Miller of their lawful actions, debts and demands, and for that purpose did agree that the defendant Samuel T. Miller should convey all his land to the defendant William R. Miller upon and for an assumed and fictitious consideration ; and that the defendant William Miller should receive the legal title thereto, with the secret understanding that it should be for the use and benefit of the defendant Samuel T. Miller ; and in pursuance of said agreement, the said Samuel T. Miller did convey his real estate to the said William R. Miller ; that the consideration recited in said deed is one thousand dollars, and the receipt of said sum acknowledged to have been received by said Samuel T. Miller.

The petition further states that on the 15th day of March, 1860, one John B. Duncan recovered a judgment in the Circuit Court of the county of Gentry, in the State of Missouri, against the defendant Samuel T. Miller, for the sum of four hundred and fourteen dollars and twenty-five cents for his debts and damages, and also for his costs of suit amounting to the sum of eighty-six dollars and forty cents, upon which judgment and execution issued on the 20th day of July, 1860, directed to the sheriff of the county of Gentry, for the amount of the costs of said suit ; and upon the 21st day of July, the sheriff levied said execution upon the real estate described in said petition as the property of the defendant Samuel T. Miller, and in due form of law advertised and sold the same on the 18th day of September, 1860, to one H. B. Make, for the price and sum of fifty-eight dollars, and received a sheriff's deed therefor ; that on the 28th of November, 1860, the said H. B. Make conveyed said land to plaintiff by deed duly acknowledged. The petition then

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charges that the deed made by Samuel T. Miller to William R. Miller was made for the purpose of hindering, delaying and defrauding the creditors of Samuel T. Miller; and that the defendant William R. Miller received the legal title to said land with full knowledge of said fraudulent intent, and without having paid any valuable consideration therefor. The petition closes by reviewing the plaintiff's chain of title, and praying that the deed from Samuel T. Miller to William R. Miller be set aside and held for naught.

The answer of the defendants denies all allegations of fraud contained in the bill, and alleges that the deed from Samuel T. Miller to William R. Miller was executed for a valuable and sufficient consideration. The answer also charges that the defendant Samuel T. Miller retained in his possession and in his name sufficient land to pay all the debts he owed. It also charges that the Duncan judgment, under which the plaintiff claims, had been compromised and settled by said Duncan and Samuel T. Miller prior to issuing execution thereon.

On the trial of the cause the plaintiff introduced the execution in favor of Duncan and against Samuel T. Miller, which recites, "that John B. Duncan on the 15th day of March, 1860, at our Gentry court, hath recovered against Samuel Miller a judgment for debt which to the said John B. Duncan was adjudged, together with the costs of said suit in that behalf expended. (which said costs will fully appear endorsed hereon as set out in the fee book in my office). These are therefore to command you," &c., closing in the usual form and attested by the clerk of the Gentry Circuit Court. This execution was put in the hands of Thomas Kier, sheriff of Gentry county, on the 21st day of July, 1860, who endorsed on the back of the execution a levy of the real estate in question, and on the 10th day of August, 1860, it passed into the hands of G. W. Burch, successor to Thomas Kier, who proceeded to advertise and sell the land, and executed a deed to Make. The deed was then introduced by the plaintiff, and recites the execution and

levy as though it was all done by Burch. The plaintiff then introduced the deed from Make and wife to himself.

The plaintiff, to support his allegations of fraud, introduced the evidence of H. M. Park, who testified that he took the acknowledgment of the deed from Samuel T. Miller to William R. Miller; that Samuel T. Miller, at the time he acknowledged said deed, said that he intended that William R. Miller (his son) should have a part of the land he was deeding to him, but did not designate what part, and that he was conveying the rest to him so that he might sell it all together, for he wanted to sell it all; that there was no money passed between the parties in his presence. Another witness said that Samuel T. Miller asked witness to send him a buyer for the land, that he wanted to sell it; and another testified that William R. Miller said, about the time of the rendition of the Duncan judgment, that Duncan would get nothing, for his father had sold all his lands to him. Plaintiff proved by a witness, William Garrison, that he bought Miller's interest in a mill and agreed to pay some of Miller's creditors as part payment for the mill, and specifies several creditors which he did pay, and said that Duncan was the only one he knew of whose claim was not paid. The plaintiff also offered to prove that Samuel T. Miller, in compromising a suit against himself and William R. Miller, had attended to the same alone, making all the arrangements and agreements in relation thereto, and paid the amount agreed to be paid, himself, in said settlement, and directed the deed to be made to William R. Miller.

This evidence was objected to by the defendant and excluded by the court. The plaintiff here closed his case, and the defendant introduced an agreement between Samuel T. Miller and John B. Duncan, agreeing to compromise the Duncan judgment by conveying to Duncan certain lands lying in Harrison county, and Duncan agreed to release his judgment for the debt and pay one-half of the costs of the suit. Daniel R. Miller, a son of Samuel T. Miller, was then introduced, and proved that his father owned considerable land in

Gentry and Andrew counties, and that he owned a considerable amount of personal property, and that his father, over and above his debts, was worth some two thousand dollars. The defendant then introduced a deed to certain real estate, and introduced some other evidence as to his personal property, and closed his case.

The cause was then submitted to the court, who found for the defendant; to reverse which it is brought here by appeal.

In the course of the trial several instructions, or declarations of law, were asked by both parties, some of which were given and some refused, and the principal complaint made by the plaintiff is on account of the improper declaration of law laid down by the court. In chancery cases it is unnecessary for the court to give any instructions; nor is it the practice of this court to specially review instructions in this class of cases, where the facts were submitted to the court; but if it turns out upon a general review of the whole case that the judgment is clearly for the right party, it will be affirmed, although some mistakes may have been made in declaring the law. The sixth instruction in the series given at the request of the defendant is certainly erroneous; it declares, in substance, that the deed and execution under which the plaintiff claims are void. I do not know that I exactly understand the objection made to them. The execution, it is true, fails to give the amount of the debts recovered in the judgment; but it is only intended as an execution for costs, and it refers to the judgment with sufficient precision so that no person can be mistaken about the judgment it is issued on, and seems otherwise substantially to comply with the law.

And it is still more difficult to see the objections to the deed; it contains all the recitals that the statutes require, and indeed more, for it recites a levy made by the sheriff upon the real estate, which was unnecessary. And herein is perhaps the objection which the court below had to the deed, for it is recited in the deed that the sheriff, Burch, levied upon the real estate; while the execution shows that

the sheriff, Kier, endorsed the levy upon the execution. It is not deemed that the variance would invalidate the deed even had the recital been material, but it surely could not affect it when the recital in the deed was mere surplusage that might be entirely omitted without injury.

It was error in the court to give the instruction spoken of; but, notwithstanding this, it appears, from an examination of the whole case, that the judgment was manifestly for the right party. The deed from Miller to his son is a specialty, and imports a consideration, and there is very little evidence tending to impeach the consideration; while the evidence on the part of the defendant shows that he had more than property enough to pay all his debts, independent of the land in question, and that he did pay his debts. Indeed there is evidence tending very strongly to show that the Duncan judgment, under which the plaintiff claims, had been paid prior to the issuing of the execution. The execution is only for costs, and that the costs are unpaid is perhaps partly owing to the negligence of Duncan; for it requires no great stretch of the imagination to see that, if the debt had not been paid, the execution would have been for the debt as well as costs; and if the debt was settled by virtue of Duncan and Miller's agreement, Duncan ought to have paid his half of the costs. It would be a great hardship when a man is striving to pay his debts, and is paying them as fast as he can, to set aside his deeds which he has perhaps made for the purpose of raising money to pay his debts, because he has left the costs of a suit unpaid which he had reason to believe would be paid, in part, by another.

The decree is manifestly for the right party, and, the other judges concurring, the judgment will be affirmed.

Lincoln v. Hilbus.—State v. Phillips et al.—State v. Smith.

JOHN K. LINCOLN, Plaintiff in Error, v. JOSEPH HILBUS, Defendant in Error.

Judgment—Irregularity—Appearance.—Smith's Adm'r v. Rollins, 25 Mo. 408, affirmed. A party appearing in court to move to set aside a judgment against him for irregularity, is in court for that purpose only.

Error to Clay Circuit Court.

This case comes precisely within the principles enunciated in Smith's Adm'r v. Rollins, 25 Mo. 408. The plaintiff in error had a right to appear in court to have a judgment against him set aside that was wholly irregular; but he was in court for one purpose and for one only.

The judgment will be reversed and the cause remanded. The other judges concur.



STATE OF MISSOURI, Appellant, v. JOHN PHILLIPS *et al.*, Respondents.

Appeal.—Dismissed for failing to prosecute.

Appeal from Livingston Circuit Court.

It appearing from the record in this cause that the appellant has failed to prosecute her appeal herein, and no sufficient cause being shown for such failure, the motion to dismiss is sustained. The other judges concur.



STATE OF MISSOURI, Appellant, v. WM. SMITH, Respondent.

Appeal.—Dismissed for want of assignment of errors.

Appeal from Daviess Circuit Court.

It appearing from the record in this cause that the appel-

lant has failed to appear and file her assignment of errors herein, and no sufficient cause for such failure being shown, the motion of the respondent to dismiss is sustained. The other judges concur.

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NORTH MISSOURI RAILROAD COMPANY, Appellant, v. GEORGE
W. STEPHENS, Respondent.

Attorney—Authority.—Where several suits were brought by the same plaintiff against different defendants—the defences being the same in each case—and the attorneys of the several parties agreed that all the cases should abide the final decision in one case; *held*, that the agreement was within the authority of the attorneys and was binding upon the parties.

Appeal from Macon Circuit Court.

Carr, for appellant.

I. The law upon which the defence in the “Winkler case” was based having since been repealed, it can no longer be pleaded by the respondent as a defence to the cause of action alleged in the petition.

1. The agreement pleaded by the respondent, as a defence to the cause of action alleged in the appellant’s petition, is not an agreement between the appellant and respondent to abide the final judgment that would be rendered in the “Winkler case,” or that the same kind of a judgment should be rendered in this case as was in that. It does not purport to be such an agreement: it only purports to be an agreement between James Carr, R. S. Bevier, and A. L. Gilstrap, who style themselves “counsel for the respective parties plaintiff and defendant,” and simply stipulates that “we will abide the final judgment which shall be rendered in said case,” *i. e.* the “Winkler case.” Now, there is no stipulation here that the North Missouri Railroad Company, party on the one side, and George W. Stephens, party on the other side, would abide the final judgment which would be rendered in the

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"Winkler case"; or that said parties agreed, or even were willing, that the same kind of a judgment should be rendered in this case as in that case. Note the language used: "We will abide the final judgment." The personal pronoun "*we*" is used, and in the first person plural. If the appellant and the respondent had been the contracting parties intending to bind themselves, the third person would have undoubtedly been used. The third person is the only proper person to be used in speaking of a railroad corporation; it is the person that is always used. It follows, then, that this is only an agreement between counsel for their own private convenience, to save the trouble of trying the other cases. It is altogether voluntary; it creates no legal rights or obligations, either as to the appellant and respondent, or even as to their counsel, which a court, sitting to enforce legal rights and obligations, can enforce. (Hunt v. Johnson, 23 Mo. 432; Marguard v. Reiter, 30 Mo. 248.)

2. There is no consideration to support said agreement; it is a mere *nudum pactum*, and not binding on the appellant.

3. It is not within the scope of an attorney's employment or authority to make an agreement of this kind; and it is not pretended that the attorneys for the appellant had any positive authority to do so. (Graham v. Gale, 7 Cow. 739; *id.* 453; 7 Mass. 19; 10 Wend. 89; Wells v. Evans, 20 Wend. 250; Stackhouse et al. v. O'Hara's Exec'rs, 14 Pa. 88.)

II. The law upon which the defence in the "Winkler case" was based having been repealed, it can no longer be pleaded by the respondent as a defence to the cause of action alleged in the petition.

The defence as pleaded is *ipso facto* rendered null and void. If the "Winkler case" were now pending, that defence would be altogether nugatory; and if nugatory in the "Winkler case," is it not so in this case? It is based altogether upon a law which has no existence. There is nothing to bottom this defence upon now.

So far is this doctrine carried, that where a penalty is im-

North Mo. R.R. Co. v. Stephens.

posed by act of Congress and the law expires, the forfeiture cannot be enforced, although there was a judgment below. The repeal of the law imposing the penalty is of itself a remission. (U. States v. Schr. Peggy, 1 Cranch, 103; Yeaton et al. v. U. States, 5 Cranch, 281; U. S. v. Ship Helen, 6 *id.* 203; U. S. v. Morris, 10 Whea. 246; Butter v. Pennsylvania, 10 How. 402; State of Md. v. Balt. & Oh. R.R. Co., 3 How. 534; Connor v. Bent, 1 Mo. 169; Hartwig v. People, 22 N. Y. 95.)

Taylor & Gilstrap, for respondent.

The agreement, as made by the attorneys of the parties, was written out, signed, and filed in the court below, and was made within the scope of their authority, and is binding upon the parties. (Gattend & Gravillen v. Smart, 6 Cow. 385; Quarles & Thompson v. Porter, 12 Mo. 84; Hunt v. Johnson, 23 Mo. 432; Houston v. Mitchell, 4 S. & R. 309; Marguard v. Reiter, 30 Mo. 248; Doods v. Doods, 9 Barr. 815; Holder v. Parker, 7 Cranch, 452; and cases therein cited.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought suit against the defendant, in the Circuit Court of Macon county, on subscription to stock. Several other suits precisely similar were brought at the same time, in the same court, against different defendants, and among them one by the name of Winkler. The same defence was made in each case. The attorneys for the respective parties entered into a written agreement, stating that, as the same facts and the same questions arose in all the causes mentioned, they would therefore abide the final judgment that should be rendered in the case of the plaintiff against Winkler; and that a like judgment should be rendered in each of the several cases. Upon a trial of the cause in the Circuit Court, judgment was given in favor of Winkler; from which the plaintiff appealed to the Supreme Court, in which court the judgment was affirmed.

As preliminary to the main question, it may be necessary to state that the defence relied on, and which prevailed, was the violation by the North Missouri Railroad Company of the act of 1855 to prevent illegal banking. (R. C. 1855, p. 286, § 9.) After the decision in the Supreme Court, so much of that act as refers to this controversy was repealed. (Sess. Acts 1863, p. 5.) The court below rendered judgment for defendant in accordance with the above agreement, and, after an ineffectual attempt on behalf of plaintiff to obtain a new trial and arrest the judgment, the cause is appealed to this court.

The position assumed by the appellant's counsel is, that, the Legislature having repealed the penalty contained in the act of 1855, a valid and subsisting obligation exists against the respondent, and that the attorneys had no authority to enter into the agreement, and that it is therefore void. The whole question is involved in the binding force and validity of the agreement. How far an attorney-at-law may bind his clients by his arrangements, in a case without special instructions or authority, is not definitely settled. There is no doubt that many entries which he might make on the docket—agreements about continuances, admissions about evidence, or the general conduct of the trial—would bind his client. It is said, in many cases, that he has a right to submit a cause to arbitration; but this doctrine has been restricted, in others, to suits actually pending in courts; whilst it is generally denied that he has a right to enter into a compromise without authority from his client, either express or implied. The arrangement in this case is not a compromise according to the usual acceptation of that term, for that generally applies to releasing a part of the debt, taking land instead of money, or changing the nature and character of the thing to be recovered; it comes nearer with- in the general management of the case.

In the *Bank of Georgetown v. Geary* (5 Pet. 99), suit had been instituted upon a promissory note against the drawer and endorser, and the attorney for the bank requested the

endorser to confess a judgment on the note, assuring her, if she did so, and did not dispute her liability, the bank would immediately proceed, by execution, to make the amount thereof from Merrill, the principal debtor, who (he assured her) had sufficient property to satisfy the same; and advised her that she would thus be saved from liability for the debt—prevailed on her to make no defence against the suit at law, but voluntarily to confess a judgment thereon. No execution was issued against Merrill according to the terms of the agreement with the attorney, but the bank continued to indulge him, and permitted him to leave, taking with him all his property beyond the process of the court. The judgment debtor filed her bill for the purpose of obtaining an injunction to restrain the bank from proceeding to collect the money on the judgment. The bill charged that, at the time of confessing the judgment, a valid legal defence existed against said suit which would have defeated the bank's right to recover on the endorsement, the bank not having made the due and legal demand and given due and legal notice so as to bind the endorser; that the attorney of the bank well knew the same, and, to prevent the complainant from contesting the same, made the proposition above stated, &c. The bank, in its answer to the complainant's bill, denied that its attorney had any authority to hold out any inducement to complainant to confess judgment, or make any promises, as set forth in the bill; and, as a further defence, contended that the agreement was without consideration and void: but the court held that the attorney had authority to make the agreement, and that the consideration was sufficient even though a subsequent decision showed that the defence of the endorser could not have prevailed.

There are many marks of similarity between the two cases. In the absence of any adjudication of the question involved in this case, the rights of the appellant were at least doubtful. Should the suits be regularly litigated step by step, and ultimately determined adversely, the costs accruing in the several courts would, of course, have been a

charge or a burden ; the arrangement was, therefore, highly judicious and convenient. But it is shown by the decision of this court in the Welker case, that respondent had a good and substantial defence to appellant's cause of action at the time the agreement was entered into, and his rights cannot be prejudiced by the subsequent repeal of the law, when he was precluded from prosecuting his defence by an agreement solemnly entered into in good faith. The facts show that he suffered material injury, and that is a sufficient consideration ; and to permit a judicial decision now to annul an agreement made under a different state of things, would be sanctioning bad faith and setting a most mischievous precedent. In addition to this, the case was permitted to slumber several years in the court below, and no act of the appellant ever manifested an intention of disturbing the arrangement entered into until the Legislature repealed the law on which respondent relied for a defence. The length of time that intervened when no action was taken would warrant us in the presumption that the client had ratified the act of the attorney. Every consideration of justice, equity, and moral obligation, dictates that the stipulation of the attorneys should be carried out and enforced.

The other judges concurring, the judgment is affirmed.



SPENCE H. GREGORY, Appellant, v. JOHN T. CHEATHAM *et al.*, Respondents.

Witness—Contradiction—Evidence.—Where an attempt is made to impeach a witness by showing that he has made statements differing from his testimony, the witness must have his attention called to the time, place and circumstances of the statements made and the person to whom made, that he may have the opportunity to explain the contradiction. If the attempt be made to impeach his testimony by statements made after the taking of his deposition, a new commission must be taken out, and he must be interrogated as to his contradictory statements before his testimony can be impeached.

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86a	155
86	155
87a	114
87a	118

Appeal from Livingston Circuit Court.

The plaintiff asked the court to instruct the jury :

1. If the jury find that Cooper and wife made the deed in controversy to defendant Cheatham with the intent to hinder, delay or defraud the creditors of said Cooper, and that the said Cheatham had knowledge of such fraudulent intent at the time of accepting the said deed, and that said Cheatham intended to aid, they will find the deed fraudulent.

2. If the jury find that Cooper was largely indebted at the time of making the conveyance to defendant Cheatham, and that the consideration actually paid by Cheatham was greatly less than the said property was reasonably worth at the time, it is a circumstance from which they may infer that the said deed was fraudulent, provided they further find that Cheatham knew of Cooper's intent to defraud, hinder or delay his creditors.

3. If the jury find that Cooper made the conveyance to Cheatham with the intent to hinder and delay the creditors of Cooper, they will find for plaintiff if they believe defendant Cheatham accepted said deed with knowledge of Cooper's said fraudulent intent.

The court refused the 3d instruction so asked by plaintiff, to which the plaintiff excepted.

Defendant prayed the court to instruct the jury as follows :

1. That if defendant Cheatham bought the property in good faith and for a valuable consideration, his deed is valid and cannot be set aside at the instance of plaintiff.

2. That the transaction between Cooper and Cheatham is presumed to be honest, and the burden of proving it otherwise is upon the plaintiff.

3. That the deed in question is not fraudulent unless plaintiff proves the same to have been made with the intent, on the part of Cooper, to cheat, hinder or delay his creditors ; and not even then, unless he further proves that defendant

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Cheatham, at the time he took the deed, had knowledge of Cooper's said intention, and accepted the same with the view to aid or assist Cooper in his said fraudulent intent to cheat his creditors.

4. That defendant had a right to secure his own debt, if Cooper was owing him anything, by the purchase of his property; and it made no difference to him what Cooper's intention was, if he bought in good faith and for a valuable consideration, and to secure an existing debt, in whole or in part.

The instructions asked by defendant were given by the court, to which the plaintiff excepted.

L. T. Collier, for appellant.

I. The court erred in rejecting the proof offered by plaintiff of other conveyances, executed by Cooper to other parties at and near the time when the deed from Cooper to Cheatham was made. In the investigation of questions of fraud, the range of inquiry is necessarily broad, and can have no very well defined limit. The evidence proposed should have been admitted; and when all in, if found by the court to be irrelevant, might then have been withdrawn from the jury. (*Lane v. Kingsberry*, 11 Mo. 402; *Carson v. Murray*, 15 Mo. 378; *Blue v. Penniston*, 27 Mo. 272.)

II. The court erred in permitting the notes of Gregory v. Cooper and the testimony of Wells in relation thereto, as well as the letter of Holt, to go to the jury for the purpose of impeaching the deposition of Holt. To impeach a witness by proof of contradictory statements made by him out of court, or on other occasions, it is indispensable that the attention of the witness sought to be impeached should first be called to the alleged contradictory matter, that he may have the opportunity of explanation; and this rule extends to subsequent as well as to previous statements of the witness, and applies to all declarations made out of court, whether oral or written. (1 *Greenl. Ev.*, § 462, p. 578; *Clapp v. Wilson*, 5 *Denio*, 285; *Stephens v. The People*, 19 *N. Y.* 589;

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Kimball v. Davis, 19 Wend. 437; Stacy v. Graham, 14 N. Y. 498; Unis v. Charlton's Adm'r, 12 Grat., Va. 484; McDaniel v. Bacon, 2 Cal. 326; Drennen v. Linsey, 15 Ark. 359; Conrad v. Griffey, 10 How. U. S. 38, or 21 Curtis, U. S. 23; Bryan v. Walton, 14 Ga. 185; Smith v. The People, 2 Mich. 415.)

III. The court erred in refusing the 3d instruction asked by plaintiff, and in giving the 3d and 4th asked by defendants. (18 Mo. 178, and authorities there cited.)

Additional list of authorities—1. As to record of conveyances: Lane v. Kingsberry, 11 Mo. 402; Carson v. Murray, 15 Mo. 378; Blue v. Penniston, 27 Mo. 272. 2. As to the letter; 1 Greenl. Ev., § 462, p. 578; Clapp v. Wilson, 5 Denio, 285; Kimball v. Davis, 19 Wend. 437; Conrad v. Griffey, 21 Curtis, 23. 3. As to instructions: 12 Wend. 298; 13 Wend. 570; 18 Mo. 178.

Ray & Woolfolk, and *Turner*, for respondents.

The 3d instruction asked by plaintiff was rightfully refused, because a creditor has a right to purchase the property of his debtor, to secure a pre-existing debt, notwithstanding the debtor may intend by said sale to hinder or defraud some other creditor, and notwithstanding the creditor knows that fact; provided the creditor, in good faith, purchases the property, at fair prices, to secure his own pre-existing debt; and that is the ground of the 4th instruction given for defendant. In other words, a debtor has a right to prefer one creditor to another.

The court committed no error in refusing to allow plaintiff to show that said Cooper had made other conveyances of other property, to other parties, at other times; because this deed must stand or fall upon its own merits. If made in good faith and for a valuable consideration, it must stand, however fraudulent other deeds may have been. It would have embarrassed the court, and multiplied the issues to an indefinite extent, if the fairness and validity of all the deeds and transactions to which Cooper may have been a party were to be looked into upon this trial.

For the purpose of testing the credibility of a witness, it is always competent to show by legitimate testimony that he is interested in the event of the suit in which he testifies; it was therefore right and proper to show what relation he bore to this case and what interest he had in it.

In relation to the introduction of the letter of Holt to Wells, it is proper to say that, under the circumstances, it was impossible, and therefore improper, to apply the rule (laid down in some of the authorities and denied in others), that you cannot contradict a witness by proving what he has done or said out of court until you have first asked him, upon cross-examination, whether he has done or said such a thing. In this case it was impossible, for at the date of the deposition he had not written the letter in question; the foundation, then, for contradicting him could not thus be laid in the case, and the law requires no impossibilities.

The witness (Wells) shows that the consideration for the deed did not embrace but a small balance of prior indebtedness from Cooper to Cheatham, but was made up mostly by other items then advanced and assumed or transferred by the witness. These show that if the letter is left out altogether, the verdict is still for the right party. (15 Wend. 420; 3 Caines, 278; 17 Mass. 160; 1 Blackf. 86.)

LOVELACE, Judge, delivered the opinion of the court.

This is an action brought to set aside a deed made by one Charles Cooper to the defendant Cheatham. The court below found a verdict for the defendant, to reverse which the case is brought here by appeal. On the trial the court called in the aid of a jury, and submitted to them the following issues of fact:

1. The plaintiff affirms that the deed from Charles Cooper and wife to John T. Cheatham, mentioned in plaintiff's petition and dated March 29, 1862, for certain real estate described therein, was made, acknowledged and delivered by the said Cooper and wife to the said Cheatham without any sufficient, adequate and valuable consideration therefor, and

with the intent to hinder, delay and defraud the creditors of the said Charles Cooper in the collection of their just debts.

2. The plaintiff also affirms that the defendant Cheatham accepted said conveyance with full knowledge of the fraudulent intent with which it was made, and with the fraudulent purpose and design to aid and assist the said Charles Cooper in hindering, delaying and defrauding his creditors, and in screening and protecting the property aforesaid from the payment of Cooper's debts.

The defendant denied both of these propositions, and affirmed that said deed was made and received in good faith and for a valuable consideration.

The plaintiff, in support of his case, introduced the deposition of Thomas Holt, who resides in Alton, Illinois.

The plaintiff then introduced evidence tending to show that the property conveyed by the deed was worth much more than the consideration expressed in the deed; and, also, evidence tending to show that Cooper was largely indebted at the time of making the deed in question.

The defendant, then, for the purpose of impeaching the evidence of Thomas Holt, and to show his interest in the controversy, introduced the notes upon which plaintiff's original judgment was obtained against Cooper, and also a letter from Cooper to Elisha Wells, in which were statements differing from what the witness had sworn to in the deposition; to the introduction of all which the plaintiff objected.

The errors relied on to reverse this judgment are, 1st, the admission of improper evidence on behalf of the defendant; and, 2d, the giving of improper instructions to the jury.

1. The improper evidence complained of was the introduction of the notes and letter above referred to. With regard to the notes, very little need be said; they constituted a part of a record upon which plaintiff's right to sue depended. To show that he was a judgment creditor of Cooper, it was necessary that he should have read at least a portion of that record in evidence. The only interest he had in Cooper's property was such as that record gave him; and the

plaintiff being compelled to read a part of the record to make out his case, the defendant was plainly entitled to read the balance. (*Kritzer v. Smith*, 21 Mo. 296.) With regard to introducing the letter for the purpose of contradicting the witness, the rule, as laid down by the elementary writers, seems to be this:—If it is intended to impeach the credibility of the witness by showing that he has made statements out of court differing from those sworn to in court, the witness must have his attention called to the time, place and circumstances of the statements, and the persons to whom made, in his cross-examination, in order to give him an opportunity to explain the contradiction if he can. This rule seems to apply to written statements as well as verbal. (1 Greenl. Ev., §§ 462–3.) It is intended for the protection of the witness, that he may not be dealt unfairly with, by proving apparent contradictions which might have been explained had his attention been called to them.

In this case, however, it is contended that the letter being written after the deposition was taken, it was impossible to call the witness's attention to the letter at the time the deposition was taken. In *Conrad v. Griffey* (21 Curtis, 23) it was attempted to contradict the witness by a letter which had been written by the witness some time before. McLean, J., in delivering the opinion of the court, said: "The rule is well settled in England that a witness cannot be impeached by showing that he made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such statements to individuals by whom the proof was expected to be given"; then, after citing the authorities, the learned judge goes on to say, "the rule is generally established in this country as in England."

In *Kimball v. Davis* (19 Wend. 457) it was attempted to discredit the witness by contradictory declarations made after the taking of the deposition. It was there held, that the only way to do this was to sue out another commission and examine the witness as to the matter about which it was desired to contradict him. The authorities all seem clear, that the

witness cannot be contradicted without first calling his attention to the matter about which he is intended to be contradicted. And in *Conrad v. Griffey* it is said that the rule applies to written as well as verbal statements. Written statements are as susceptible of explanation as verbal ones, and the witness ought to have the same opportunity to explain them. And if the contradictory statements are made after the taking of the deposition, then, according to the doctrine of *Kimball v. Davis*, which seems to be correct, the party seeking to contradict the witness must sue out another commission and examine him as to his contradictory statements. This rule, though intended to protect the character of the witness against unlooked for assaults, is nevertheless one in which parties litigant have a very deep interest; for if the credibility of a party's witnesses is destroyed, his case will necessarily fail, and he may very justly complain of the ruling of the court. The introduction of the letter to impeach Holt certainly cannot be maintained consistently with any of the authorities we have been able to find, and a judgment rendered under such circumstances ought not to stand.

2. With regard to the instructions, we see very little to review. If the jury had been required to pass upon the issues submitted, and not upon the general *bona fides* of the deed, the instructions could have had but very little effect. The plaintiff complains that the third instruction, asked by himself, was not given, and complains of the giving of each of the instructions asked by the defendant.

There was no error in refusing the third instruction asked by the plaintiff, for the reason that the same principle of law had already been twice given—in the plaintiff's first instruction, and in the defendant's third: this was often enough. There is no occasion of repeating the same proposition of law over and over again to the jury.

The fourth instruction given on behalf of the defendant is subject to some objections. It declares that "the defendant had the right to secure his own debt (if Cooper owed him anything) by the purchase of his property; and it made no

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difference to him what Cooper's intention was if he bought the property in good faith, for a valuable consideration, to secure an existing debt, in whole or in part." This instruction is not well supported by the evidence; the evidence being, that the greater portion of the consideration was Cheatham's assuming liabilities for Cooper, and not the payment of his own debt. With these facts, then, the instruction was well calculated to leave the impression on the minds of the jury that if Cheatham paid a valuable consideration for the property, it would make no difference even though he knew that Cooper intended by the sale to defraud his creditors. The instruction was too broad, and, in addition to that, the law intended to be covered by it was fully reached by the other instructions.

The other judges concurring, the judgment will be reversed and remanded, to be tried in accordance with this opinion.

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GEORGE W. ASH, ADM'R, &C., Respondent, v. JOHN M. HOLDER, Appellant.

Vendors and Purchasers—Equity—Estoppel.—An outstanding title purchased by a vendee of land in possession under a title bond, enures to the benefit of the vendor. In a suit upon the notes given for the consideration, the vendee cannot defeat a recovery upon the ground of failure of title, but will be allowed the cost and expenses of his purchase of such outstanding title.

Appeal from Monroe Circuit Court.

Carr, for appellant.

I. Generally an offer to return the property received is as effectual to rescind the contract as actually returning it. Upon this principle, then, the offer of the appellant to rescind the contract and deliver the possession of the land to the intestate is equivalent to an actual rescission; and if so, then the appellant had the lawful right to buy in the title outstanding in the heirs of Lucy A. Dye, and when he did

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so, the purchase did not enure to the benefit of the intestate. If the purchase were allowed to enure to the benefit of the intestate, it would be allowing him to take advantage of his own wrong, and rewarding him for his dishonesty. (*Musson v. Bunot*, 1 Denio, 69; *Howard v. Cadwallader*, 5 Blackf. 225; *Chit. on Cont.* 750; *Price v. Evans*, 26 Mo. 30; 11 Mo. 149; 9 Mo. 484.)

II. The petition is fatally defective in not averring that the respondent was ready and willing to perform the contract alleged in said petition and in not offering to perform it, and likewise in not averring that he had good title which he was ready and willing to convey to the appellant upon the payment of the purchase money. The petition does not state facts sufficient to constitute a cause of action in this respect, and hence the motion in arrest of judgment ought to have been sustained. (*Bruce v. Tilson*, 25 N. Y., p. 198, and authorities there cited; *Washington & Turner v. Ogden*, 1 Blackf. 450; *Pomeroy v. Drury*, 14 Barb. 418; *Greene v. Reynolds*, 2 Johns. 207; 10 Johns. 266.)

III. There is a defect of parties to this suit. The vendor having died, whatever title he had to the land in controversy descended to his heirs, and hence they were necessary parties, so that all the parties in interest might be before the court; and then whenever a decree of sale should be made and a sale made in pursuance of such decree, it would pass the whole title to the purchaser. (*Sto. Eq. Pl.*, § 160; *Morgan v. Morgan*, 2 Wheat. 299; *Perry's Adm'r et al. v. Roberts*, 23 Mo. 221; *Harrison v. Nixon*, 11 Curt. 442; 9 Pet. 483; *Carneal v. Banks*, 6 Curt. 370; 10 Wheat. 181; *Harding et al. v. Handy*, 6 Curt. 529; 11 Wheat. 103.)

The decree rendered in this case is erroneous in ordering only the right, title and interest of the appellant in the land in controversy to be sold. It should have ordered the right, title and interest of the intestate to have been sold likewise.

Hall & Oliver, for respondent.

I. The petition is sufficient. This is simply a suit to col-

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lect certain notes due plaintiff's intestate, and to subject to sale the interest of defendant in and to certain land, to satisfy the judgment upon the notes. The heirs of plaintiff's intestate had no interest in the subject matter of the suit, nor in the object of the suit; they were not necessary nor proper parties. (Sto. Eq. Pl. § 72, pp. 136-7.)

This is not a suit to enforce specific performance of a contract for the sale of land; but even in a suit for specific performance of such a contract, the heir or vendor is not a necessary party under our statute. (R. C. 1855, pp. 148-9, §§ 32, 42-3-4-5.)

II. It was not necessary for plaintiff to allege in his petition an offer to convey a title in his intestate to the land sold to defendant. The conveyance of the land was not a condition precedent to the payment of the purchase money. (Thompson v. Crutcher, 26 Mo. 321.)

III. The evidence shows that defendant has possession of the land, the sale of which was the consideration of the notes in suit; that he received that possession from the plaintiff's intestate in pursuance of said sale, and that he has never been disturbed in his possession. He cannot keep possession of the land and refuse to pay the purchase money. (Wallace v. Boston, 10 Mo. 662-3; Smith v. Busby, 15 Mo. 392; 2 Sug. on Ven., t. p. 15; 1 *id.* 262.)

IV. The defendant having purchased in the outstanding title to said land, rendered it impossible for plaintiff's intestate to perform his contract; and said intestate is therefore relieved from its performance. In all cases the promisor is discharged from liability if the promisee do any act which renders it impossible for the former to perform his agreement; and in such case the promisor stands in the same situation as though the performance of the contract had been perfected. (Chit. on Contr., 738.)

V. Defendant by purchasing in the outstanding title, as above stated, limited plaintiff's recovery on covenants in deeds to his intestate to the amount expended by defendant in purchasing said title, and justice requires that his recover-

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ing against defendant should be limited to the same sum. (Raw. on Cov., p. 44; Lawless v. Collier, 19 Mo. 480.)

VI. Defendant having received possession of the land as aforesaid, and retained possession of the same, became a trustee for his vendor in buying the adverse title. The title thus purchased enures to the benefit of his vendor, and his vendor can only be compelled to refund or to allow to defendant the amount he paid for the said title. Defendant is not entitled to a rescission of the contract with plaintiff's intestate. (Galloway v. Finley, 12 Pet. 294-5.)

WAGNER, Judge, delivered the opinion of the court.

It is unnecessary to determine the point, extensively discussed in this case, as to whether the respective obligations relied on were in the nature of mutual, concurrent, or independent covenants. In view of the special facts, the question is unimportant. Appellant, by his own act, had precluded the respondent or his intestate from complying with the covenant contained in the title bond, by buying up the outstanding title and vesting it in himself. The material question is, whether a purchaser taking possession of premises under a bond for title, can, on discovering a defect in the title of his vendor, buy in the outstanding title and hold the same adversely. It is well settled that a vendee may dispute the title of the vendor after conveyance passed, because then he owes him no faith or allegiance; he holds adversely to him and all the world. But where there has been a sale, but no conveyance, the party taking possession under a bond for title cannot set up an outstanding title to defeat the vendor. The vendor and vendee are then said to stand in the relation of landlord and tenant. (2 Marsh, 242; 5 Yerger, 398; 3 Pet. 43; 12 Pet. 264.)

This is the general rule, though there are cases in which it has been varied. Its justice and propriety are strongly vindicated by the facts in this cause. At the appellant's instance and request the respondent's intestate purchased the land out of which this suit originated, and agreed to take it

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off his hands at the same price and on the same terms which he gave for it. The contract price was upwards of two thousand dollars. In pursuance of the agreement the appellant took possession of the land under a bond for title, and has been in quiet and undisturbed possession ever since. Upon discovering a defect in the title, he notified his vendor of its existence, who then gave notice to the person of whom he purchased. The latter made an unavailing effort to find the persons who held the legal title and purchase the same; afterwards appellant, on becoming acquainted with the residence of those in whom the legal title was vested, proceeded to acquire the same for the sum of three hundred dollars, without giving any notice to his vendor. Good faith and fair dealing will not support such a proceeding. He who seeks equity must do equity. The offer to rescind was of no consequence; the claim was not relinquished to the vendor, nor the possession abandoned. The money and the land could not both be retained.

The appellant insists that respondent's intestate was guilty of fraud in the sale of the lands; but if there is any fraud in the case, it is very evident it was not committed by the latter. The court allowed a credit of three hundred dollars on the notes, the amount paid in purchasing in the outstanding title, together with the expenses laid out and expended in procuring the same. This was as favorable for the appellant as could have been asked. The title acquired by the appellant enured to the benefit of the respondent's intestate, though it vested the legal title in the former. It may be considered the same as if a direct conveyance had passed between the parties. This being the case, the vendor in contemplation of law having complied with his contract, and the suit being simply for the sale of the land, we are not prepared to say that the heirs were indispensable parties.

The judgment is affirmed. The other judges concur.

JOHN GOODFELLOW, Defendant in Error, v. ISRAEL LANDIS,
Plaintiff in Error.

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1. *Note—Attorney—Assignment.*—An attorney who receives a note for collection after its maturity, has no power to sell and assign the note.
 2. *Note—Endorsement.*—An endorsement in blank of a promissory note by the holder to a third party, is evidence of an assignment for value, only when the note is taken in the ordinary course of trade.
 3. *Depositions—Notice.*—If a party appear at the taking of the deposition and cross-examine the witness, he cannot afterward object to the sufficiency of the notice.

Error to Buchanan Court of Common Pleas.

The plaintiff asked the court to instruct the jury :

1. [See opinion.]
2. The endorsement of a note in blank by the holder and owner thereof, and delivery thereof to a third party, is *prima facie* evidence of the assignment of the same for a valuable consideration, and will vest a complete title to such instrument in any subsequent purchaser of the same.
3. If the jury find for the plaintiff, they will allow four per cent. damages on the whole amount of note, and damages at the rate of six per cent. *per annum* from the maturity of said note.
4. Any purchaser of a note endorsed in blank has a right to fill up said endorsement to himself.
5. Purchase of the note by Goodfellow, if he did purchase it in good faith, was no fraud upon Landis, even though it might have been done at the request of Burd.

The court, on motion of defendant, gave the following instructions, to wit: Nos. 1, 2, 3, 4 & 5.

Defendant asked that the following instructions be given :

1. The court instructs the jury that they will find for the defendant, unless they believe from the evidence that Calhoun, Sterling & Co., in person, or by a person duly authorized by them to do so, endorsed the note with endorsement (sued on herein) thereon of the name of the defendant, intending to pass the title thereto.

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2. They will find for the defendant if they believe from the evidence that Calhoun, Sterling & Co., who were the holders and owners of the note filed with the plaintiff's petition, and placed the same in the hands of Henry Hitchcock, an attorney-at-law, for collection to be sued upon, which was done by him by suing J. W. Burd, the maker of the note; and after suit was brought, said J. W. Burd, or some other person, paid over to said attorney the full amount of the note to the satisfaction of said attorney, and the suit was by agreement dismissed at the defendant's costs; and further, this does not constitute an assignment or transfer of the note so as to enable the plaintiff herein to sustain this action.

3. That the employing of Henry Hitchcock to institute suit against the maker of said note, and collect the same from him, did not in any manner authorize him to sell or transfer said note; and unless they believe from the evidence that Henry Hitchcock had a general power from Calhoun, Sterling & Co. to transact their business, or a special power from them to transfer the paper in controversy, they will find for the defendant.

4. The jury will find for the defendant unless they believe from the evidence that Sterling, Calhoun & Co., in person, or by an authorized attorney, assigned the note sued on to the plaintiff.

Ensworth, and Bassett & Lawson, for plaintiff in error.

The plaintiff knew that Hitchcock had the note for collection, and his authority was limited to that; and it devolved upon the plaintiff to prove that Hitchcock had the right to make the assignment, which Hitchcock denies. So does Sterling, so does the defendant below; and the law arising on the evidence of J. C. Jamison shows he had no right. Now what is the effect of an assignment after a negotiable note is due? It is equivalent to the act of drawing a new bill payable at sight. (Chit. on Bills, ch. 4, 215 *et seq.*; Sto. on Prom. N., § 148, and notes.)

Now, from the evidence, could plaintiff recover of Calhoun, Sterling & Co.? If it was a valid assignment, they are responsible on the assignment the same as if they had drawn a bill at sight. Hitchcock certainly had no right to make a contract of that kind and bind the said firm; and the deciding of that question in favor of Calhoun, Sterling & Co., determines Hitchcock's right to pass the bill, if not determined by his limited right to collect. Having no right to make the transfer, the court erred in permitting the assignment to be read. (13 Mo. 596; 14 Mo. 125, 166, 523; 3 Mo. 290; 6 Mo. 7.)

The giving of instructions, embracing abstract principles of law, instead of presenting the precise questions and such only as arise from the evidence in the case, is reprehensible and erroneous. (3 Mo. 290.) Such instructions have a tendency to mislead the jury, or, in other words, takes the mind of the jury from the issue as presented by the facts of the case as proved before them. (3 Mo. 620.) When instructions are too general and not warranted by the evidence, they are not corrected by the giving of other instructions. (4 Mo. 279; 6 Mo. 43; 17 Mo. 142.)

Grubb & Jones, for defendant in error.

I. If A., the payee or endorser of a note, place the same with his blank endorsement thereon in the hands of B., and B. sell and deliver the same to C., who has no notice of any limitation of power in B. over such note, then C. gets a good title to the same.

II. That the endorsement and delivery of a note to a party is *prima facie* evidence of sale, &c.

III. Endorsee has power to fill up, &c. Such are, in substance, the instructions on part of plaintiff below, and are certainly correct. (*Odell & Fink v. Presbury et al.*, 13 Mo. 330; *id. v. Gray & Co.*, 15 Mo. 337; *Lovell v. Everton*, 11 Johns. 52; *Smith's Merc. L.*, 292, and note on p. 293.)

LOVELACE, Judge, delivered the opinion of the court.

Several preliminary questions have been raised upon the

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evidence in this case, which can have no practicable bearing in a proper determination of the cause. It is complained that the court erred in refusing to suppress depositions upon the ground that no sufficient notice of the taking had been given; but, upon examining the depositions complained of, it turns out that the defendant cross-examined the witnesses, and surely a notice that actually brings the party notified to the place of taking the deposition ought to be regarded as sufficient.

It is also complained that the plaintiff was permitted to read part of a deposition and withdraw the part he had read, and not compelled to read the whole deposition; but the defendant was afterwards permitted to read the whole deposition, so it is difficult to see how any serious harm could result from this. But the principal difficulty in the case seems to be that issues made by the pleading were never submitted to the jury, or not properly submitted.

The answer of the defendant raises two material issues. One puts in issue the assignment of the note sued on to the plaintiff; and the other pleads payment of the note by the maker. The first of these issues, the assignment of the note, is perhaps incidentally submitted to the jury, but not in a way to induce them to attach much importance to it; and the other, the payment of the note, seems not to be submitted at all. The instructions treat the note as a bill that had passed regularly around, in the ordinary course of business, from the original payee to the plaintiffs, without noticing the fact that the plaintiff received it from the hands of an attorney in whose hands it had been placed, after maturity and protest for non-payment, for the purpose of collecting the same by suit. Instead of treating him as an attorney having a special authority over the note, the first instruction speaks of him as the *bona fide* holder of the note, with full power to transfer the same to whom he pleased. This instruction reads as follows, and is very justly complained of:

“ If the jury believe from the evidence that the defendant Landis sold and transferred the note sued upon to Calhoun,

Sterling & Co., and that said Calhoun, Sterling & Co. afterwards endorsed the same in blank and delivered said note to one Henry Hitchcock, and that said Hitchcock sold and delivered said note to the plaintiff or his agent for value, then said transfer was good and valid, and plaintiff thereby became the owner of said note and is entitled to recover the amount thereof with interest and damages from the defendant, unless it is further shown by the evidence that the power of said Hitchcock over said note was limited to the collection thereof, and that plaintiff or his agent had notice of such limitation at the time of purchase."

Now it is very possible that a state of facts might arise upon which this instruction would be a correct declaration of law, but it is certainly not this case. The evidence was that the note was given to Henry Hitchcock as an attorney, for the purpose of collection; and it was the duty of the court to tell the jury what his powers were over the note, and only submit to them in what capacity he received it—whether in due course of trade, or as an attorney charged with the collection. It was perfectly competent for the jury to say in what capacity Hitchcock held the note. That was a question of fact; but his power over the note was a question of law for the court to determine; and on that subject it would hardly be contended that an attorney had power when he received a dishonored bill for the purpose of collecting the same by suit, to discount the bill and thereby render his clients liable as endorsers. And yet if the defendant Landis is liable as endorser, Calhoun, Sterling & Co., are also liable as endorsers. That would be forcing them into a contract of liability on the note without their knowledge and against their will. This instruction is clearly erroneous.

The second instruction is very little better, if any, than the first. It declares that "the endorsement of a note in blank by the holder or owner thereof to a third party, is *prima facie* evidence of the assignment of the same for a valuable consideration, and will vest a complete title to such

instrument in any subsequent purchaser of the same." This would have been true as an abstract proposition of law, if it had been limited to such persons as receive the instrument in due course of trade. But the very circumstances under which a person receives an instrument of this kind after maturity, may entirely destroy the idea of its carrying with it title; and in such cases the jury ought to be told whether the facts probably proven by the evidence will warrant a conclusion of law of that kind. In other words, the instruction ought to hypothecate material facts which the evidence tends to prove, and declare the law upon those facts. A correct declaration of law that is not supported by facts which the evidence proves, or tends to prove, may go very far towards confusing a jury, and causing them to render an improper verdict; and such was certainly the tendency of this instruction, for it took entirely from their consideration the manner of the delivery of the note by Hitchcock to the plaintiff, which constitutes the whole defence in this cause. The question, whether the plaintiff received it in the ordinary course of trade, is either assumed or entirely ignored.

We see no objection to the other instructions given at the request of the plaintiff. They properly lay down the effect of the transaction between plaintiff and Calhoun; Sterling & Co., supposing it to have been a *bona fide* sale of the note.

The first instruction asked by the defendant was properly refused. That instruction undertakes to assert in general terms, that a person buying a note with a blank endorsement has no right to fill up the blank. This was an incorrect statement of the law, and the court very properly refused it.

On account of the misdirection of the jury in the first and second instructions asked by the plaintiff and given by the court, the cause is reversed and remanded to be re-tried in accordance with this opinion.

**ALEXANDER CONSTANT, Plaintiff in Error, v. JOHN J. ABELL,
Defendant in Error.**

Landlord and Tenant.—Where the military authorities took possession of demised premises, and held possession of the same without the consent of the lessee after the expiration of the term: *Held*, that the lessee was not liable for rent of the premises after the expiration of the term although he had received from the Government the rents accruing during the term.

Error to Buchanan Court of Common Pleas.

The plaintiff moved the court to give to the jury the following instructions, viz :

1. Plaintiff moves the court to instruct the jury, that if they believe from the evidence that the parties who occupied the property mentioned in plaintiff's petition, before and after the 20th of August, 1862, were the tenants of defendant and paying him rent up to that time ; and, further, that they continued to occupy said property after said 20th day of August, 1862, without any new contract with plaintiff, for two months, then they will find for the plaintiff, and assess his damages at three hundred dollars, with interest from the time such rent was due at the rate of six per cent. per annum.

2. If defendant rented said property to said military authorities of the United States, or State of Missouri, or authorized them to take possession of it, and collected rent from them prior to the 26th day of August, 1862, and up to that time, and paid rent to plaintiff up to that time, then plaintiff had a right to regard the defendant as his tenant ; and a holding over after said 20th of August, 1862, by the parties in possession without any objection on the part of plaintiff, and without any new contract with plaintiff, made said defendant the tenant of plaintiff from year to year, and plaintiff is entitled, in such case, to recover one year's rent with interest as aforesaid.

The court refused the first, but gave the second instruction.

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The defendant moved the court below to instruct the jury as follows, viz. :

1. The defendant moves the court to instruct the jury, that if they believe from the evidence that defendant held the whole house and property, named in the lease in plaintiff's petition set forth, by a joint lease as therein set forth, and that previous to the expiration of said lease the United States and State of Missouri have taken possession without lease of the whole of said house, without lease of defendant, for hospital purposes, and that defendant paid up the rent until the expiration of said lease, and that the State continued to occupy it after said lease expired, and for said time; that the State occupied said house after said lease expired, said Beauvais & Robidoux applied to the State and received from her officer the rent for said house, thereby accepting the State as their tenant, then the law does not presume that defendant held over under said lease for another year, and in such case the jury will find for the defendant.

2. That if the military authorities of the State held said house, after the expiration of the lease named in plaintiff's petition, without the consent of defendant, then he is not liable for holding said premises over after the expiration of said lease, and they will find for the defendant.

3. That if, after the military authorities had held said property, after the termination of said lease, the agent of plaintiff applied to the said authorities for pay for said house, then he cannot hold that defendant had held over for another year, and recover the rent from him.

4. That unless the jury believe from the evidence that defendant did hold the plaintiff's property for a time over and after the expiration of said lease, they will find for defendant.

The court gave all of defendant's instructions, to which plaintiff objected.

Jones & Townsend, for plaintiff in error.

The court erred in refusing to give the first instruction

asked on the part of the plaintiff, as also in giving those asked on the part of the defendant.

The lease provides for several payments; that is, so much to Beauvais, so much to Robidoux, and so much to plaintiff. The fact that all are embraced in the same lease, cannot certainly affect the right of each one to sue and recover the amount due to him separately. The ownership of the property was not joint, but each of the three parties owned a distinct part of it, and of different values, as shown by the case; and the original lessees agreed to pay them separately. Defendant took an assignment of the lease with these provisions, and paid the rent to the agent of the plaintiff up to the 20th of August, 1862, for his (plaintiff's) portion of the property. It cannot be said that a payment to the other parties, Beauvais and Robidoux, up to the said 20th of August, of the three hundred dollars a year, due to the plaintiff, would have been good against him; then how can it be said that a payment by the military authorities, made afterwards, can have a different effect? As to what constitutes a several contract, see *Robbins v. Ayres*, 10 Mo. 538; *Sublitt v. Nolan*, 5 Mo. 516; 19 Mo. 42.

The second instruction on the part of the defendant is, in effect, that it must be shown, in order to entitle the plaintiff to recover, that defendant consented to the holding over on the part of the military authorities. The defendant was plaintiff's tenant, and was certainly bound to deliver up the property, or offer to do so; he was permitting the Government to occupy the property, and collecting the rent. It was not for plaintiff or his agent to know whether the holding over was with or without the consent of the defendant. Plaintiff had to look to him. The Government was, at the most, an under-tenant, and not liable to plaintiff for rents. (Tay. Land & Ten., § 448.)

The third instruction seems so clearly erroneous, that we can hardly see how it can be insisted upon. The agent of plaintiff was anxious, of course, to collect the rent. It was immaterial as to who should pay it. He demanded it of

plaintiff, was refused, and then tried to get it of Maj. Chew. Here he also failed; Maj. Chew refused to pay; he had no contract to pay rent to plaintiff; the defendant had. How could this contract be changed by the fact of McLaughlin having asked Chew if he would pay, &c.? A tenant cannot resist payment of rent without showing that he was legally evicted, &c. (Tay. Land. & Ten., 372, 375.) As to the effect of holding over after the expiration of the term, see Tay. Land. & Ten., 13 & 35, and authorities there cited.

If a tenant holds over after the expiration of the term, the landlord may elect to treat him as a tenant or a trespasser; if he fails to proceed against him as a trespasser, a new tenancy arises, by implication, upon the same terms as the old. (Tay. Land. & Ten., § 22.)

H. M. & A. H. Vories, for defendant in error.

The lease to defendant's assignor was a lease made by Robidoux, Beauvais & Constant, by which they, by one entire contract, rented to him an entire house. After the lease was out, two of the parties received their pay from the Government, and recognized the Government agents as tenants; hence there could be no presumption that the defendant held over the other small and useless part of the house. If there is a holding over, it cannot be as to part of the contract, but the whole lease must be renewed.

Again, at the time that Robidoux and Beauvais applied to the Government for the rent for the house, after the termination of the lease to defendant, they received all of the pay that the Government would give for the whole building, as it refused to issue more than one voucher for all, so that plaintiff should have called upon them for the rent of his part of the house. It was impossible for the defendant to have held over under the lease, as more than two-thirds of the house and premises were received by Robidoux & Beauvais, and rent received therefor from others; hence the judgment being for the right party, it will not be reversed.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff sued for a year's rent of three hundred dollars upon an implied new leasing by the defendant for another year, as a tenant holding over after the expiration of his written lease, which expired on the 20th day of August, 1862. The answer denied any holding over or any new leasing for another year, and alleged for a further defence, that on the 14th day of January, 1862, the military authorities of the Government took possession and control of the leased premises, and held the same for the uses of a hospital until the 15th day of December, 1862, when the possession was turned over to Robidoux & Beauvais, lessees in the same lease of other parts of the same premises, held severally by the terms of the lease; that the defendant left the premises ready for the lessor to take possession of them, but that he was not in the State, and had no agent authorized to take possession for him; that the military officers were ready and willing to pay for the occupancy thereof, and that since they took possession in January, 1862, he had had no control over the premises.

The evidence tended to support the answer. And it further appeared that the military officers paid the rent of the whole premises to Robidoux & Beauvais on one voucher, and that the defendant had received his portion of it from them until the expiration of his lease, the Government continuing to occupy as before, after that time. It appeared that an agent of the plaintiff attended to his business generally in his absence; that the defendant had paid his part of the rent due the lessor up to the 20th of August, 1862, when his lease expired, and refused to pay afterwards; that the agent did not object to the occupancy of the military authorities, and when the defendant refused to pay, he called on Maj. Chew, quartermaster, for the rent, but failed to get it from the Government for the reason that they settled with Robidoux & Beauvais, and would not make but one voucher in the matter, and did not know him in the business. It was

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in evidence, also, that the military authorities took possession of such property as they needed for their purposes, whether the owners consented or not.

The plaintiff moved the court to instruct the jury to the effect, that if the same parties, tenants of the defendant, paying rent to him, occupied, after as before the expiration of the lease, for two months without any new contract with the plaintiff, they would find for the plaintiff the year's rent with interest, and the court refused. The court then gave four instructions for the defendant, to which the plaintiff excepted, and thereupon took a non-suit with leave, and the case comes up by writ of error.

The case is attended with some difficulties, owing to the peculiar circumstances. A lease for a term of years, expires by effluxion of time at the last moment of the last day of the term. The lessor knows this as well as the lessee, and no notice is required to apprise him that the leased premises will be vacated on that day; and if the lessee quit possession, the lessor has nothing to do but enter and take possession. Even when there is a tenancy by the year under a lease which gives the tenant power to determine it on giving notice, and he gives the notice and quits possession, no action can be sustained against him for use and occupation afterwards. (Archb. Land. & Ten., 147.) But if there be an actual holding over, there is no question but a new leasing for another year, if rent be paid and accepted, or a tenancy at will, if not, at the same rent, will be implied; but such holding over is a matter of fact to be proved by other evidence than the lease. (Tay. Land. & Ten., § 58.) And when there is no payment and acceptance of rent after the expiration of the term, if the tenant hold over but for a short period, without any act to make him a trespasser, he is not at liberty to deny that he is at least a tenant at will or by sufferance. (*Id.*, § 22.) When the lease expires, the tenant ought peaceably and quietly to vacate and surrender the premises; and if he has underlet the possession to another, he must get him out, otherwise he is not in a position to give

up to the landlord that full possession to which he is entitled. But even if he do not remove the under-tenant, he is not thereby rendered liable for another whole year's rent, nor is a tenancy from year to year created, but only a tenancy at will, and he will be liable only for the period of the actual holding over. (Tay. Land. & Ten., § 524.) The holding over may be by an under-tenant, but then there must be some privity of contract between the lessee and such person that will make him an under-tenant in order that it shall become a holding over by the lessee.

It is said that an action for use and occupation can be maintained against the tenant even for the time his under-tenant may have holden over against his consent (Archb. Land. & Ten., 147); but this supposes that there is some privity of contract between them which makes the one the under-tenant of the other. Here the military authorities took possession of these premises without any contract with the lessee and against his consent. They paid the whole rent to Robidoux & Beauvais on one voucher, and the defendant merely received his portion of it from them until his lease expired. He then vacated the premises as far as it was in his power to do it, and ceased any longer to receive any part of the rent collected by them from the Government. Such receipt of rent may be considered as a recognition to some extent of the actual occupation of the military authorities as tenants at will or by sufferance; but that circumstance alone can hardly be sufficient evidence of a holding over for another year, or any such tenancy by contract as would make them his under-tenant.

If the military authorities held over without his consent, they also came in against his consent, and without any contract with him. He suffered them to remain without any attempt at eviction, but continued to pay his rent to his lessor as he was bound to do, notwithstanding such eviction by a stranger, until the expiration of his lease, in the same manner as if his possession had not been interfered with. They were intruders upon him, and he left them intruders upon

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the landlord. If they failed to pay rent for the use and occupation, to the satisfaction of the owner, he could recover the possession on a landlord's warrant without any inquiry whether they came in as under-tenants, or as mere trespassers (*Willi v. Peters*, 11 Mo. 395; *Shepherd v. Martin*, 31 Mo. 492), unless prevented by the action of the military authority for which this defendant was not responsible.

After the expiration of the lease, the military authorities paid the whole rent, it seems, to Robidoux & Beauvais, as before; and it does not appear why the plaintiff's agent did not call on them as the defendant had done during his term. But he called upon the quartermaster, who refused to pay him, because he knew only Robidoux & Beauvais in the matter, and would make but one voucher. This shows, at least, that he was willing to recognize the occupancy of the military officers, and to accept rent from them, rather as tenants of his own than as intruders.

We think the facts proved did not warrant the conclusion that a tenancy from year to year, or holding over for another year by the defendant, had arisen, or could be legally implied, and that he was clearly not liable for a whole year's rent; nor are we satisfied that the military authorities had become the under-tenants of the defendant in such a way as to make him responsible as upon a holding over, even as a tenant at will, for the period of the actual occupation. The relation of landlord and tenant will not be inferred, if the position of the parties can be referred to any other distinct cause. (*Tay. Land. & Ten.*, § 25.) And the whole difficulty here is rather to be attributed to the action of the military officers, than to any holding over or any default on the part of the defendant.

For these reasons we are of opinion that the instruction refused for the plaintiff was correctly refused, and that even the second was erroneously given. And taking the instructions given for the defendant in connection with the evidence on which they were predicated, though the second one be

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liable to objections as being rather too broad, on the whole, we see no good cause for reversing the judgment.

The other judges concurring, the judgment will be affirmed.

SAMUEL D. HILL, Respondent, v. J. W. MILLER, Appellant.

1. *Lands—Pre-emption—Equity.*—The act of Congress concerning pre-emption gives the officers of the Land Department the right to determine all questions arising between different settlers. The fee of the lands in this State being originally in the Government, and Congress being vested exclusively with the primary disposal of the soil, the presumption is in favor of the action of the officers designated to execute the laws made for that purpose. Where the officers are vested with discretionary authority, their acts are not subject to the revision of our courts; but when they act without authority of or in violation of law, then jurisdiction will be assumed. A patent carries the legal title, and the presumption is that all necessary preliminary steps have been taken, and in favor of its validity; and the burden of proof is upon him who impeaches it.
2. *Practice—Pleading—Equity—Fraud.*—A petition which seeks to set aside a patent and to hold the patentee as trustee, upon the ground of fraud, must be as definite and precise as was formerly required on a bill in chancery. It is not sufficient to make a general allegation of fraud without any other specifications of the acts which constituted it.

Appeal from Daviess Circuit Court.

Upon the trial, the court, at the instance of the plaintiff, declared the law to be as follows:

1. That the certificate of entry, read in evidence by plaintiff, is *prima facie* evidence that the pre-emption law, upon which the same is founded, was complied with by plaintiff before said entry was made.
2. That if plaintiff complied with said pre-emption law in making said entry, and obtained said certificate from the proper officers of the United States, then after that the said United States was no longer, in equity, the owner of said land, and had no right to sell the same to anybody else.
3. That if said defendant made his said entry, or pur-

chase, of said tract of land from the United States after the date of plaintiff's said entry, and with actual notice thereof, such purchase is a fraud upon plaintiff, and cannot be set up as a defence to this suit.

4. That upon and after plaintiff's said entry of said land, the same, in equity, was no longer the property of the United States, and that thereafter the United States held the mere legal title in trust for the plaintiff, and that any subsequent purchaser obtaining the legal title thereto, with notice thereof, would hold the same charged with said trust, and be compelled to convey the same to plaintiff.

5. That the decision of the Register and Receiver in regard to pre-emption rights is conclusive only against the Government, and that when two or more titles to the same tract of land have emanated from the General Government to different individuals, it is competent for our courts to decide upon their respective validity, without being bound by any attempted adjudication thereon by said Land Office in any of the departments.

6. That the certificates and documents from the General Land Office, showing the action of the Land Department, in the attempted vacation of plaintiff's entry, offered in evidence by defendant, did not divest plaintiff of his right, and is no evidence before this court to show that plaintiff did not comply with the pre-emption law in making his said entry.

7. That plaintiff's entry of said land being *prima facie* evidence that pre-emption was complied with by plaintiff, said pre-emption remains good until defendant shows by competent evidence in this court that said law was not complied with, and that the documents and certificates from the General Land Office, read by defendant, is competent evidence *only* to show the *action* of the Land Office in the premises, but not competent to show in this court that said pre-emption law was not complied with.

The defendant then asked the court to declare the law to be,

1. That a patent is better evidence of title than a certifi-

cate of purchase, and must prevail over such certificate, unless it be shown that such patent was obtained through fraud of the rights of the holder of such certificate, and that the business of showing fraudulent obtaining of such patent is upon him who seeks to impeach the same.

2. That the Commissioner of Lands had the right to cancel the entry of plaintiff, and to permit defendant to purchase the lands in controversy, and that his right to do so cannot be inquired into by the courts of this State.

The first of which was given by the court, but the second was refused.

H. M. & A. H. Vories, for appellant.

I. The act of Congress entrusted the Register and Receiver and the Commissioner of the General Land Office with the power to decide upon the merits of the respective claims of plaintiff and defendant to the right of pre-emption to the lands in controversy. Their decision, when made, is conclusive between the parties, and cannot be revised or inquired into by the courts of the State of Missouri. (*Lewis v. Lewis*, 9 Mo. 183, and cases cited; *O'Haulon v. Perry*, 9 Mo. 585; *Winter v. —*, 18 How. 89.)

The case of *O'Brien v. Perry*, 28 Mo. 500, does not conflict with the above when properly considered. There, the land was reserved from sale.

II. It is admitted that the courts of the State might interfere in a case where one had obtained a decision in his favor in such case, and obtained a legal title to the land under such circumstances of fraud as to create an implied trust in him for the use and benefit of another. But in the case now under consideration no such specific charge of fraud is made in the petition, and none were attempted to be proved. The only thing charged is, that the plaintiff received the first certificate of entry, which the evidence shows was afterwards cancelled and set aside by the proper authorities; yet the court below, in this case, decides that by said certificate, no matter how obtained, the United States became a trustee for

plaintiff, and that everybody who received title from the Government, with notice of the facts, takes the title with the trust. This is certainly in conflict with the law as heretofore decided by this court. (*Lewis v. Lewis*, 9 Mo. 183; *Bird v. Ward et al.*, 1 Mo. 498; *Stephenson v. Smith*, 7 Mo. 610; *Carman v. Johnson*, 20 Mo. 108.)

III. In this case the evidence shows that the plaintiff's certificate was set aside by the General Land Office, and he notified to apply and get his money back, which in the absence of evidence to the contrary it is presumed he has done, and the defendant has purchased the land and paid the entrance money therefor; and yet the Circuit Court decrees that the defendant shall convey the land to the plaintiff, without refunding the purchase money or any part thereof. For this, if for no other reason, the judgment in this case must be reversed. (*Bird v. Ward et al.*, 1 Mo. 498.)

IV. The patent, read in evidence by the defendant in this case, shows a complete appropriation of the land in controversy, and vests in the defendant the title, all preliminary steps being merged in the patent. No fact behind the patent can be investigated by the State courts, except questions of independent fraud or trust existing between the parties; not merely legal or technical fraud, but actual and positive fraud, in fact, committed by the defendant. (*Boardman v. Reed et al.*, 6 Pet. 328; *Singer v. Young et al.*, 3 Pet. 320; *Bagnall et al. v. Broderick*, 13 Pet. 436.) No question of notice can be considered in such case. (See Judge McLean's opinion in the case last cited, p. 454; *Alison v. Hunter*, 9 Mo. 750.)

V. Congress is vested with the sole power to dispose of the public lands, and no State, or the courts thereof, can interfere. (*Wilcox v. Jackson et al.*, 13 Pet. 498.)

And where a patent has not been issued (as is the case with the plaintiff in this case), a State has no power to declare any title less than a patent valid against the claim of the United States to the land, or against any title held un-

der a patent granted by the United States. (*Wilcox v. Jackson, supra.*)

VI. Each of defendant's motions, the one in the arrest of the judgment, and the motion for a new trial in the cause, should have been sustained by the court.

Ray, for respondent.

The court committed no error in giving the instructions or declarations of law asked for by the plaintiff, or in refusing the second, asked for by the defendant. (9 Mo. 749; 3 How., U. S., 509; 1 Mo. 281; 11 Mo. 585.) As to the general propriety of the amended petition, upon which the case was tried, see 20 Mo. 108; 7 Mo. 610; 28 Mo. 500; *id* 513.

The defendant below insisted, and the appellant here will doubtless claim, "that the decision of the Register and Receiver, between two parties claiming rights of pre-emption to the same piece of land, is *final*, and cannot be overruled by the State courts." It is admitted that such is the doctrine as laid down in 9 Mo. 183, and several other cases; but in all these cases, but *one* title had ever been issued to one of the contending parties; the other, failing to get, or to have gotten, any title at all. In all that class of cases where this doctrine is held, it will be found upon examination that the unsuccessful party never held or obtained any title whatever, whether inchoate or perfect. But in this case the facts are different. Both parties had obtained and held different and distinct titles to the same lands; both emanating from the same General Government at different times, and evidenced by different species of document, having different effects, &c. One, it is true, was inchoate, the other perfect, so far as was necessary to pass the mere legal title. This is not a case where the parties claiming rights of pre-emption to the same tract of land, make simultaneous application to the Register and Receiver to enter, and when the decision is much in favor of the one and against the other, and

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when the successful party only gets a certificate of entry ; but it is a case where the plaintiff had first proved up his pre-emption and made his entry, and got his certificate as such, and where, afterwards, the Commissioner of the General Land Office attempts to vacate and set aside the entry thus *once* made, and grant a certificate of entry to another, which is prosecuted to a patent—thus transferring the mere legal title to a junior entry.

No case can be found where *two* titles have thus emanated from the General Government, and a contest arose between our citizens in reference to same in our State courts, but what they have entertained jurisdiction of the cause and inquired into the acts of Federal officers, and, if need be, overhauled them and set them at naught. (11 Mo. 585.)

This proceeding does not invalidate the patent, or seek to impeach the act of the officer granting the same ; but recognizes its validity, and asks that the title thus acquired may be transferred to the equitable holder. (20 Mo. 108 ; 7 Mo. 610, above referred to.)

Plaintiff's certificate of entry made for him a *prima facie* case, which was not attempted to be rebutted by independent original evidence in said court, but only by showing what a different tribunal had decided. The validity of defendant's patent is not called in question as an official act of a competent officer ; but defendant's right to the title, thus issued, is denied, and proved by showing that he purchased from the United States with full knowledge of the plaintiff's prior purchase, which is a fraud upon the plaintiff ; and he, having thus acquired the legal title in fraud of plaintiff's right, will be required to convey to him.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff in the court below, respondent here, brought his suit in the Daviess Circuit Court, claiming certain land situated in said county, of which the defendant was in possession. The petition contained two counts ; the first was in the nature of an action of ejectment, for the recovery of the

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possession of the premises; the second was in the nature of a bill in equity, asking that the defendant who held the legal title by patent, might be compelled to convey the same to plaintiff, and also charging that defendant obtained his said title by fraud and falsehood. It also charges that plaintiff had the superior equitable title, by reason of an entry at the Land Office at Plattsburg, Missouri, made in pursuance of the pre-emption laws of Congress, prior to the entry of the said defendant on which the patent issued; and that the defendant made his entry and acquired title with full notice of this fact.

The defendant, in his answer, denied explicitly all the averments contained in the first count in the petition, except the fact that he was in possession of the premises. He further denied that he was guilty of any fraud or falsehood in making his said entry, or in obtaining his patent; or that plaintiff had any right or title to the said premises by equity and good conscience. For further answer and defence, he alleges that plaintiff committed a fraud on the Government in proving up his pre-emption claim, and that, upon the discovery thereof, his said right of pre-emption was set aside, vacated and cancelled; and that at the time he made his entry, the land was the absolute property of the United States Government, divested of all liens or claims in favor of any person whatever.

This trial was had before the court without the intervention of a jury.

The plaintiff, to maintain his action, read in evidence a receipt from the Receiver of the Land Office for \$120, dated May 18, 1855, in payment of the land named in the petition. He then introduced testimony to show that he commenced building a house on the land, to avail himself of the pre-emption act, anterior to his entry, and that the defendant had actual notice thereof. The plaintiff here closed his case.

The defendant then read in evidence the patent of the United States conveying the land to him, dated October, 1859; also copies, duly exemplified, of all the papers and

proceedings in the matter of the plaintiff's entry, had in the Land Office at Plattsburg, and before the Commissioner of the General Land Office at Washington City. It seems that on an affidavit being made and transmitted to the Commissioner, that the plaintiff had failed to comply with the law granting pre-emptions, the Commissioner addressed a communication to the Register and Receiver, directing them to investigate the truthfulness of the allegation contained in the affidavit, and report to him their opinion thereon. In pursuance of this authority from the Commissioner, the officers of the Land Office, after notifying the plaintiff to appear and contest his claim, proceeded to examine and investigate the alleged fraud. Witnesses were examined, and the evidence tended to show that plaintiff's entry was simulated and a palpable evasion of the pre-emption law; the officers of the Land Office both concurred in the opinion that it was fraudulent and ought to be vacated. The evidence, with the opinion of the officers accompanying, being sent to the Commissioner at Washington City, he concurred in opinion with said officers and ordered them to cancel the entry, and notify the plaintiff to apply and get his money in the usual way. After the action of the Commissioner and officers of the Land Office in vacating and cancelling plaintiff's said entry, defendant then applied, duly complied with the law, entered the land, and received his patent.

Plaintiff objected to receiving this evidence for any other purpose than to show the action and decision of the officers themselves; and this view of the law appears to have been sustained by the court, as shown by the seventh instruction. There was no finding of the court on the first count.

The court then made a decree, divesting defendant of the legal title of the premises and vesting the same in the plaintiff.

Defendant then filed his motion for a new trial and in arrest of judgment, which, being overruled by the court, he excepted, and brings his case here by appeal.

The act of Congress concerning pre-emptions gives to the officers of the Land Department the right to determine all questions arising between different settlers; and one of the principal points involved in this case is, whether their decision is final and conclusive, or subject to review in the State courts.

The decisions in this court are far from being harmonious; indeed it is impossible to reconcile them. It is obvious that where titles emanated from the General Government and a contest arises on their validity between citizens of this State, our courts must assume jurisdiction, else there would be a total denial of justice; no other tribunal has been authorized by law to take cognizance of such cases. But the fee to all our lands being originally in the Government, and Congress being vested exclusively with the primary disposal of the soil, the presumption is in favor of the action of the chosen or designated officers or agents who are clothed by that body with power to carry out and execute its laws made for that purpose. Where the officers are vested with discretionary authority, their proceedings are not liable to be reviewed or revised by this court; but when they act in disregard or violation, or without authority of law, then jurisdiction will be assumed. A patent carries the whole legal title to the patentee, and the presumption of law is that all preliminary steps have been complied with and in favor of its validity; hence when a party impeaches the validity of a patent, the *onus* or burden rests on him to show that it is illegal or void.

In this case, did the officers of the Land Office, together with the Commissioner, transcend their legitimate duties or act without law? An interference will never be allowed, unless their action is plainly fraudulent or not within the scope of their power; and he who seeks to stamp them with the impress of fraud, or raise a trust in his behalf, must adduce evidence thereof the most clear and satisfactory. Judge Scott has said, "the United States is the owner of the public lands, and can dispose of it on such terms and in such man-

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ner as seems fit. It is declared by law that he shall have a title who can show himself entitled to it to the satisfaction of the Register and the Receiver. In a case free from fraud and collusion, these officers declare that a particular individual, to their satisfaction, has proved himself entitled to a tract of land, and it is given to him accordingly." He then lays down the doctrine in the broadest manner that their decision is final and conclusive, and that this court cannot examine into the correctness of their judgment. (Lewis v. Lewis, 9 Mo. 182.)

In Perry v. O'Hanlon, 11 Mo. 585, Perry, as assignee of Vallé, filed his claim with the Recorder of Land Titles for six hundred and thirty-nine acres of land; this claim was rejected by the first Board of Commissioners. Another board was subsequently appointed by act of Congress who were authorized and required to examine claims of this description. Testimony was taken before the board in relation to it. Before any action was had on this claim, however, Perry, in 1834, attempted to avail himself of the pre-emption privileges granted to the claimants who were willing to waive their claims and relinquish to the United States. According to the law in such cases made and provided, he executed his deed of relinquishment for the aforesaid lands, which was regularly filed in the office of the Recorder of Land Titles, and an abstract of which was duly transmitted to the Register and Receiver. The law required that the application should be made within a certain time and before the expiration of the time allowed by law. Perry applied to the Register and Receiver to enter the land; the officers refused the application on the ground that the surveys were incomplete. Afterwards, when the surveys had been completed, he made application to enter, but the application was refused on the ground that the law had expired. The subject was then brought to the notice of the head of the department, and the land officers were advised, that when application had been made in due time and entries were not permitted for want of surveys, or from any other cause not

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attributable to the fault or negligence of applicants, it was the custom of the Land Department to permit such entries to be made notwithstanding the expiration of the law. Perry was accordingly permitted to enter. Upon subsequent investigation, the Commissioner of the General Land Office, being satisfied that Perry was not an actual settler on the land, directed his certificate to be cancelled. A patent then issued to O'Hanlon. It was clearly shown that it was not by any fault, negligence or culpable act of Perry that the entry was not made. He had relinquished his rights for a confirmation of his claim, fully complied with the law, and made his application in due form before the law expired. The court held the patent void.

The uniform custom of the Land Department, acting under the sanction of its legal advisers, permitted such entries where they were not made in time, without the default of the claimant, but owing to the negligence or remissness of the officers of the Government. The action of the Commissioner of the Land Office in this case was very arbitrary, and inflicted great injustice on Perry.

There is a marked difference between that case and the one now under consideration. There was no imputation of fraud or unfair dealing; but, on the contrary, Perry had fully come up to every requirement of the law, and faithfully performed his part of the contract. Here the officers whose duty it was to examine into the transaction, after a full examination find the respondent violated the very law under which he seeks protection. We have been referred by the counsel for the defendant to the case of *Carroll v. Stafford*, 3 How. 441; but, upon an examination of that case, we do not think it sustains his position. That case arose out of a law of Michigan, assessing all lands for taxation in that State as soon as they were entered and before patent issued. The law was resisted mainly because, before patent issued, the legal title was still in the United States, and the Government might refuse to make out and deliver a patent to the holder of the certificate.

Mr. Justice McLean, in delivering the opinion of the court, uses the following language: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate which could no more be cancelled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate, or patent, might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate-holder and the patentee. It is said, the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity."

It would seem that this emphatic language, taken alone, would be decisive and controlling authority in favor of the proposition contended for; but it is directly qualified and explained in the after part of the opinion, wherein the learned Judge says: "The Government has no right to refuse a patent to a *bona fide* purchaser of land offered for sale. But where there has been fraud or mistake, the patent may be withheld, and every purchaser at a tax sale incurs the risk as to the validity of the title he purchases. He incurs the same risk after the emanation of the patent."

It is, then, the good faith of the entry that gives it its force and validity. This substantially harmonizes with the views of Judge Napton, in *Perry v. O'Hanlon*. Where a patent is issued for land by officers of the United States, the presumption is that it is valid and passes the legal title; but this may be rebutted by proof that the officers had no authority to issue it. (*Minter v. Crommelin*, 18 How. 871.) So, too, where the patentee obtains his patent by fraud, and with notice of an existing prior entry, he will be held a trustee for the person equitably entitled. The bad faith vitiates the transaction and defeats the mere legal title. But fraud will not be presumed; the party alleging it must prove it. In this case the Register, Receiver and Commissioner of the General Land Office had undoubted jurisdiction for the

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purpose of inquiring into the matter, and their decision will be presumed to be correct.

The respondent shows no cause of action in his petition; the mere allegation of fraud without any other specifications is not sufficient in a proceeding of this kind. It should have been as definite and precise as was formerly required of a bill in chancery.

The evidence was wholly insufficient to impress the appellant with fraud, or subject him to the character of a trustee. He did not purchase the land till respondent's entry had been cancelled or vacated for a fraudulent evasion of the pre-emption law, and there is no evidence of bad faith on his part. Mere constructive legal fraud will not answer here; it must be actual, positive fraud. This being in the nature of an equitable proceeding, we pay no regard to the instructions of the court below.

The judgment is reversed. The other judges concur.



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51a 306
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63a 544

JOHN CORBY, ASSIGNEE, &c., Respondent, v. ELEXIUS BURNS
et al., Appellants.

Justices' Courts—Execution—Constable.—A constable sued before a justice for failing to return an execution within the proper time, may, upon a proper case made, be allowed to amend his return so as to show that the execution was returned in time, although suit may have been commenced against himself and his securities.

Appeal from Buchanan Court of Common Pleas.

W. Jones, for appellants.

Loan, for respondent.

LOVELACE, Judge, delivered the opinion of the court.

This is an action against a constable and his securities for failing to return an execution within ninety days, according to its mandate. The record shows that on the second day of March, 1861, Corby obtained judgment against Thomas

Thoroughman before J. C. Robidoux, a justice of the peace for Buchanan county, and on the same day execution issued and was put into the hands of the defendant Burns, returnable within ninety days from the date. On the third of June, 1861, the execution was returned not satisfied, and this action is brought to charge the constable and his securities under the statute for the amount of the debt, and one hundred per cent. for not returning the writ within the ninety days. The action was brought before J. C. Robidoux, who tried the original suit; and, on the day this suit was tried, the defendant asked and obtained leave of the justice to amend his return on the execution, and showed by the affidavit of his deputy, who had the execution in charge, that it was in fact returned on the 29th day of May, 1861, instead of the 3d day of June; he was thereupon permitted to change the date of his return to the 29th of May, and upon the amended return the justice gave judgment for the defendants. The cause was then appealed to the Court of Common Pleas, which refused to permit the defendant to read his amended return, and gave judgment for the plaintiff, to reverse which the cause is brought to this court. The error complained of is the refusal of the court below to permit the defendant to read his amended return on the execution, upon the ground that the justice had no power to permit the return to be amended.

Courts are always liberal in permitting amendments of all pleadings and process that are before them, in order to promote the ends of justice. It is admitted by the respondent, that officers may amend their returns when third parties are interested, but cannot amend so as to exonerate themselves and their securities, and more particularly after suit has been instituted upon their breach of duty. We know of no absolute rule to this effect, unless a party has been misled by the return, and acted differently from what he would have acted had the return been otherwise. But when the return could have no such tendency, we can see no objections to a

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court permitting an officer to amend it in accordance with the facts. And the only difference we can see between amending before proceedings are commenced and afterwards, is the inducement of the officer to make a false return ; and the court before whom the application is made ought to scrutinize the application more closely on account of the interest of the officer. The court ought to be certain that the facts will justify the amendment offered to be made, and see that the amendment is made strictly in conformity with the facts. The only difference in amending his return to protect himself and amending it to protect third parties, is the officer's interest in making a false return ; not that he affects an action depending on the return, for that is the case in almost every instance where it becomes necessary to amend a return at all. In the case of *Blaisdell v. St. bt. Wm. Pope*, (19 Mo. 157,) the return omitted to state that the officer had seized the boat. The statement in the return was necessary to give the court jurisdiction of the subject matter of the suit ; and after judgment by default and a motion to set the same aside, and the officer had ceased to be the officer of the court, he was still permitted to come in and amend his return. (See also *Gwynne on Sheriffs*, 471.) The question of permitting an officer to amend his return after the writ has been filed, is a matter in the sound discretion of the court, and ought to be exercised with caution ; but we fail to see in it sufficient cause for refusing to permit a return to be read that is so amended ; especially, when it is remembered that the return is amended only as to its date, and on the affidavit of a disinterested party who was charged with the execution of the writ.

The other judges concurring, the cause will be reversed and remanded, to be tried in accordance with the views herein expressed.

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MARY FERGUSON, Respondent, v. MASON FERGUSON AND JANE
HESSON, Appellants.

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99 488

1. *Habeas Corpus—Practice—Jurisdiction.*—At the hearing upon a *habeas corpus*, the court has authority to adjudge only upon the case of the person alleged to be unlawfully restrained of his liberty, and to remand or discharge the person so restrained; beyond this it has no authority to determine the rights of the parties. Upon a petition for a *habeas corpus*, the Circuit Court has no power or jurisdiction to determine matters of guardianship, the appointment of trustees, the disposition of the property or moneys of the parties, or the making of provision for the support of the children placed in the custody of the mother, or the support of a wife living apart from her husband.
2. *Habeas Corpus—Practice—Appeal.*—From the decision of a court remanding or discharging a prisoner brought before it upon a writ of *habeas corpus*, no appeal lies.

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Appeal from Platte Circuit Court.

H. M. & A. H. Vories, for appellants.

I. The petition in this case was not sufficient to authorize the court below to issue the writ, and the same should have been quashed. By 1st sec. of R. C. 1855, p. 82—concerning “guardians, curators,” &c.—the father, while living, is made the lawful guardian of his children; § 15 of the same act gives him the charge, custody and control of the person of his wards, &c.

The petition in this case fails to show that the children have no father who was their guardian, or that he was unfit to have the care and custody of his children; or to show any cause why the petitioner was entitled to their custody: the cause should, therefore, have been dismissed. This defect in the petition could not be cured by the petitioner’s rejoinder or reply to the return of the writ, as no such thing is contemplated by the law. (Henry v. Morris, 7 Blackf. 559.) The petition fails to state in what the illegality of the restraint of the children by the defendant consists, and is therefore bad. (R. C. 1855, p. 833.)

II. The court below, upon a writ of *habeas corpus*, had no power to investigate the matter of fact, whether the father,

who was and is made guardian of his children by the law, is a competent or fit person to exercise the rights of such guardianship, and remove him from his guardianship if he is found to be unfit; the court can only inquire into the legality of the custody or restraint of the party alleged to be confined. (*Ex parte* Toney, 11 Mo. 662.)

A court of chancery might interfere if a proper case was made, but no such interference can be had upon a writ of *habeas corpus*. The statutes of New York, to obviate this difficulty and give summary relief in such cases, has provided that the same relief may be given by *habeas corpus*; but without such statutes no such power exists, and we have no such statute in this State. (*The People v. Chegary*, 18 Wend. 637; *The People v. Mercein*, 8 Paige's Ch. 47; 3 Hill, 399; 25 Wend. 64.)

III. In this case, if the court had the power to interfere with the guardianship of the father upon *habeas corpus*, the evidence is conclusive upon the subject, there being no evidence to show the unfitness of the father to have the custody of his children; and it is conclusively shown that he is a most fit and proper person, and that the children are properly treated. (*Mercien v. People*, 25 Wend. 64, opin. by Bronson.)

Hall & Oliver, for respondent.

I. It is contended that the court committed no error in ordering Elizabeth Ferguson under the control of her mother. In cases of this kind, the rule in the United States is to consider the interest of the children as one of the first importance, and the court will make such order as, in its opinion, the welfare of the children demands. The claims of the father or mother are considered as of secondary importance. (*Commonwealth v. Addicks & wife*, 5 Binney, 520; *Mercein v. The People*, 25 Wend. 91-102; *Ex re* Jane Wollstoncraft, 4 Johns. Ch. 82; *People v. Mercien*, 8 Paige, 69; 8 Johns. 328.)

II. Mrs. Ferguson was a competent witness to the brutal

treatment and conduct of her husband towards herself; she is not a party to the record; the case is really one on the part of the State of Missouri against Mason Ferguson and Jane Hesson. (8 Paige, 49; 18 Wend. 641.)

No specific objection to evidence being saved in the bill of exceptions, the objections to evidence will not be considered by the Supreme Court. (Poussin v. St. Louis Perpet. Ins. Co., 15 Mo. 246.)

III. It is competent for a mother to apply for a writ of *habeas corpus* to release her children from improper restraint by the father. On the return of such a writ, the course of practice in the courts is to deliver the party from illegal restraint, and, if competent to form and declare an election, then to allow the infant to go where it pleases; but if the infant be too young to form a judgment, then the court is to exercise its judgment for said infant. (Rex v. De Mandeville, 5 East. 122; 4 Johns. Ch. 82; 2 Kent, 252; 1 Tucker's Com. 137.)

IV. This case was tried by the court below, and its finding of facts is conclusive. The Supreme Court is not instituted to try matters of fact. (McCullough v. McCullough, 31 Mo. 229.)

V. The court below was not asked to appoint a trustee, nor to make an appropriation of Mason Ferguson's money to the use and benefit of his children. It is admitted that such an order is unauthorized in a case of this kind. Under our statute, however, this court can reform the order of the court below, or direct the court below to reform its own order. All that is contended for in the present case is, that Elizabeth Ferguson, the daughter of Mary Ferguson, be permitted to remain with her mother, as ordered by the Platte Circuit Court. There is no appeal from the order of a court, simply refusing to release a person from imprisonment, or simply ordering such a release. (Howe v. The State, 9 Mo. 690.)

HOLMES, Judge, delivered the opinion of the court.

This case comes here by appeal from the Circuit Court of Platte county, upon a judgment or decree rendered therein upon a petition for a writ of *habeas corpus*. It appears that a writ of *habeas corpus* was issued upon the petition; that the defendant made return to the writ, and that a hearing was had upon it, before the court, concerning the custody or alleged restraint of three minor children of Mason and Mary Ferguson, of the ages respectively of one, three and seven years; the eldest being a daughter—the other two, sons. Upon the hearing, the court assumed jurisdiction, not only to determine the question of discharging, or remanding, the persons alleged to be restrained of their liberty, but of various matters of guardianship, the appointment of trustees, and the disposing of the father's property for the support of the children ordered into the custody of the mother by a judgment or decree, which must be regarded as a final judgment on rights and interests of the parties, which were in no way judicially involved in a proper disposition of the *habeas corpus*. In respect of the persons restrained, the decree discharged the daughter, and ordered her into the custody of the mother, and remanded the two younger children to the custody and care of the father, upon certain conditions to be performed by him, and if not performed as ordered, then to be seized by the sheriff and delivered over to the mother; and certain sums of money were ordered to be paid by the father to trustees appointed, for the support of the children under her care. This part of the proceedings was so palpably erroneous as to require no discussion beyond a bare statement. The court had power to hear and determine the matter arising upon the petition for a *habeas corpus*, as such, in a summary manner, and to discharge, or remand, the persons restrained of their liberty, with some latitude of discretion as to which parent, under all the circumstances, was the most suitable and proper person to have the care and custody of children of tender age

for their benefit; beyond this, the court had no jurisdiction to determine the rights of the parties on a petition of this nature. (*Mercien v. The People*, 25 Wend. 91; *Ex parte Toney*, 11 Mo. 662.)

So far as the decision discharged, or remanded, the persons restrained, this court has no appellate jurisdiction to interfere with it, and no appeal lies to this court in such case. (*Howe v. The State*, 9 Mo. 682.) In this respect, the decision is not of the nature of a final judgment. It concerns only the present actual condition of things, and the order of the court is at once executed and accomplished beyond recall; and in reference to any new state of facts existing afterwards, the parties have the same remedies as before, whether by writ of *habeas corpus*, or other proceeding, in any court of competent jurisdiction; and the courts are always open to them.

The case was argued at length, and with much ability, upon the propriety of the action of the court below in disposing of the custody of the minor children, and the respective rights of the father and mother therein, under the circumstances disclosed in the evidence. We cannot undertake to review this part of the case here; as to that, we must leave the decision where it stands. Its work is already accomplished. But so far as the court assumed jurisdiction over other matters, the proceeding must be regarded as if it had been upon a petition for relief in some cause of action at law or in equity, and in this respect the decree rendered must be treated as a final judgment of the court, on which an appeal will lie; and as such, we take jurisdiction to examine and correct the errors appearing by the record. And on this, it will be sufficient to say, that, by the laws of this State, the Circuit Court had no power or jurisdiction, on a petition for a writ of *habeas corpus*, to hear and determine of matters of guardianship, the appointment of trustees, the disposition of the property or moneys of the parties, the making of provision for the support of the children placed in the custody of the mother, or the support of the wife living

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apart from her husband. In all such matters, the courts afford ample remedy and redress in the proper and regular forms of proceeding and in due course of law.

The other judges concurring, the judgment is reversed and annulled in all respects, *except* in so far as the same discharges the said Elizabeth Ferguson and orders her into the custody and care of her mother, and remands the said Henry C. Ferguson and Winfield C. Ferguson into the custody and care of their father, in which regard the same will remain unaffected by this appeal.



JOSEPH CLARK'S ADM'X, Respondent, v. HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Practice—Joinder of Causes of Action.*—Several causes of action for injuries to person or property, whether real or personal, direct or consequential, and whether the damages are given by statute or by common law, single or double, may be included in the same petition.
2. *Practice—Misjoinder of Causes of Action.*—Where several causes of action are joined in one count of a petition, the count will be bad on demurrer, or on motion in arrest of judgment.
3. *Practice—Verdict.*—Where a verdict is found for an entire amount of damages upon a petition containing several counts, if any of the counts be defective the judgment will be arrested.
4. *Practice—Instructions.*—At the close of the plaintiff's evidence, the defendant has a right to ask of the court instructions upon the case as made by the plaintiff, and to have the case submitted to the jury.
5. *Practice—Administration.*—Where an action has been commenced for damages done to real estate, if the plaintiff die pending the suit, it may be revived and conducted by the administrator.
6. *Master and Servant—Contractor.*—A railroad company is not liable for the injuries occasioned by the trespass or negligence of the servants and laborers employed by the contractor engaged in building the road. The principle of *respondent superior* applies to the contractor who employs the men, but not to the corporation with which the original contract is made. There can be but one responsible master for the same servants, and when that relation ceases the liability ceases also.
7. *Railroads—Trespases—Enclosures.*—Railroad corporations are not required to fence in their tracks so as to prevent cattle from straying upon the adjoining fields. If they fail to fence their tracks and put up proper cattle-guards, they become liable to the owners of such stock as may be injured

36	208
31a	388
36	202
98	511
35a	215
36	208
40a	456
36	202
107	340
36	202
48a	401
36	202
113	639
36	202
57a	602
36	202
61a	89
36	202
64a	332
36	202
69a	440
36	209
142	535
36	202
81a	325
82a	101
36	202
180a	252
36	202
88a	228
36	202
90a	47
90a	48
36	202
177	446

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while straying upon the track, without any proof of negligence. (R. C. 1855, p. 437, § 52, and p. 647, § 5.) The object of the statute was the protection of the railroad, the safety of passengers and trains, and the prevention of accidents and injuries to cattle or other animals straying on the track.

8. *Railroads—Trespasses—Damages.*—Where a railroad corporation has had the right of way condemned and the damages assessed under the statute, they have power to construct their road through the land thus condemned, and to do all things that may be necessary and proper for that purpose; and, to the extent of the powers and rights thus acquired, neither the corporation nor the contractors can be held liable as trespassers or wrongdoers.
9. *Railroads—Trespasses—Nuisance.*—In the absence of any negligence, unskillfulness or mismanagement in the construction of an embankment for the bed of a railroad over land through which there was no natural channel for the passage of water, the injury done by such embankment in causing the water to overflow the land of the adjoining proprietors must be considered as the natural consequence of what the corporation had acquired the lawful right to do by a condemnation of the land and the assessment of damages therefor, and such damages must be taken to have been included in the compensation assessed.

Appeal from Livingston Circuit Court.

The facts of the case are stated in the opinion.

After the evidence for plaintiff and defendant was closed, the court was asked to charge the jury as follows :

The plaintiff moved the court to declare the law to be—

1. That if, in the construction of said road, the laborers, agents or employees of said railroad, in the employment of defendant in 1857, threw down the fence around plaintiff's field of corn, at a point more than fifty feet from the centre of said railroad track, and left the same down, and that, by reason thereof, cattle, hogs, &c., entered into said field of corn and damaged or destroyed the same, the jury will find for the plaintiff the value of the corn so destroyed, or the value of the damage so done.

2. That if defendant, its agents, or employees, neglected to erect and maintain fences on the sides of said road, where the same passes through said enclosed field of plaintiff, of the height and strength of a division fence required by law, with openings or gates or bars therein, and farm-crossings

of the road, for the use of said proprietor of the adjoining land, and that, in consequence thereof, cattle, hogs and stock got into said field and destroyed or damaged said crop of corn or said crop of wheat, that the jury will find for the plaintiff the value of the corn or wheat so destroyed, or the value of the damages so done.

3. That if laborers, agents, or servants, in the employ of defendant, while grading said road, negligently threw up embankments of earth on the west side of said farm of plaintiff, thereby damming up the water and causing the same to change its channel and overflow a part of said field outside of defendant's right of way, and thereby rendered the same unfit for cultivation, the jury may assess the damage thereby sustained.

4. That if the laborers, agents, or servants, in the employ of defendant, while laying the track of said road, threw down the fence around plaintiff's field of wheat in 1859, at a point more than fifty feet from the centre of said railroad track, and left the same down, and neglected to erect and maintain a fence on each side of said road in said enclosure, and that by reason thereof the said field of wheat was left unprotected from entry by cattle, hogs and stock, and that plaintiff's crop of wheat was thereby destroyed or damaged, the jury will find for plaintiff the value of the wheat crop so destroyed, or the value of the damage so done.

5. That if, in grading said road, the agents, laborers, or servants, in the employ of defendant, threw up heaps of earth on said farm, outside of defendant's right of way, and thereby injured the same, or deposited heaps of dirt in a private road of plaintiff's, outside of their right of way, leading from his residence to the public highway, and thereby obstructed the same, the jury may assess the damage so sustained thereby.

6. That if defendant, by his agents, servants, or employees, caused a locomotive with cars attached to run over and kill plaintiff's calves, or cow, or sow, the jury may find for plaintiff the value of such stock so killed, provided the same was

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done on a part of the road not enclosed, and not at a crossing of a public highway.

7. That if the jury believe from the evidence that the work performed on the Hannibal and St. Joseph Railroad was executed under the direction and constant supervision of the Hannibal and St. Joseph Railroad Company, their officers or engineers, and that said railroad company had the power through its officers or engineers to control and direct the laborers and employees on the road in conducting their work, they will find for the plaintiff to the amount of damage sustained by him from the acts, negligence or omissions of said laborers, whether the laborers were employed by John Duff & Co., Shea & Griffin, or other sub-contractors, instead of the Hannibal and St. Joseph Railroad Company.

8. That if the jury find for the plaintiff in any sum, they may in their discretion allow interest on the amount so found by them as damages.

The court further instructed the jury :

1. It is admitted by the defendant, that in the years 1857 and 1859 the defendants, its agents, or employees, failed to erect and maintain fences on the sides of their railroad, where the same passes through said enclosed field of plaintiff, of the height and strength of a division fence required by law, with openings or gates or bars therein, and farm-crossings of the road, for the use of the proprietors of the adjoining land.

2. It is also admitted by the defendant, that the defendant by his agents, servants, or employees, caused a locomotive with cars attached to run over and kill plaintiff's calves, cow and sow, and that the same was done on a part of the road not enclosed, and not at a crossing of the public highway, and that their value was forty-five dollars, and also admits that they were killed in plaintiff's field.

The court farther instructed the jury, that, for the purpose of trial, defendant admitted that Joseph Clark, deceased, owned the land mentioned in plaintiff's petition.

Defendant admitted that the stock mentioned in plaintiff's petition was killed on that part of the railroad in plaintiff's field, and that the railroad running through said field was not fenced on either side in said field.

Defendant admits that Catharine Clark is administratrix of Joseph Clark, deceased.

To the giving of which instructions the defendant at the time excepted.

The defendant then asked the court to give the following instructions to the jury:

1. If the jury believe from the evidence that the laborers under Patrick Cochran threw down and left down the fence, described in the first count in said petition, while grading the defendant's road through said field, whereby the hogs and other animals got into said field and destroyed and injured the corn therein, they will find for the defendant on said count, unless they further believe from the evidence that the defendant, or some of its officers or agents authorized so to do, directed said laborers to throw down or leave down said fence.

2. If the jury believe from the evidence that defendant's railroad was located and constructed through the land of plaintiff's intestate, described in the petition, and that the damages resulting from said location and construction to said intestate were assessed at six hundred dollars by three discreet, disinterested citizens of Livingston county, and a judgment rendered thereon by the clerk of this court and said judgment paid by the defendant, and that the field described in the second count in said petition was overflowed and the water dammed up by reason of the embankment described in said petition, the said assessment and judgment thereon embraced all the damages resulting from the location and construction of said road through said land, and the plaintiff cannot recover any damages for the damming and overflowing of said land by reason of the embankment, as alleged in the second count of plaintiff's petition, and they will find for the defendant on said count.

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3. If the jury believe from the evidence that the teamsters and persons hauling bridge timber for Grand river bridge drove out on the wheat growing in the field described in the count in said petition, and thereby injured said wheat, they will find for the defendant on said count, unless they further find that the defendant, or its officers or agents authorized so to do, directed said teamsters and persons so hauling said bridge timbers so to do.

4. If the jury believe from the evidence that defendant's railroad was located and constructed through the land of plaintiff's intestate described in the petition, and that the damages resulting from such location and construction to said intestate were assessed at six hundred dollars, and judgment rendered therefor by the clerk of this court and paid by the defendant, and that the private way described in the fourth count in said petition was obstructed by the laborers working on defendant's railroad depositing earth excavated from said railroad on said private way, then the damages resulting from the depositing of said earth in said private way were included in said assessment and payment of damages, and the plaintiff cannot recover anything therefor, and the jury will find for the defendant on said count.

5. If the jury believe from the evidence that plaintiff's intestate was paid \$600 damages for the right of way through his land, the duty of erecting a fence on each side of defendant's railroad, where it passes through the enclosed field described in the petition, was thereby devolved on the said intestate; and if he neglected to erect such fence, and cattle and hogs got into said field for want of such fence, the jury will find for the defendant as to all damages done for want of such fence.

6. The jury are instructed, in this case, that the defendant is a common carrier of passengers and property, and as such it is bound to carry with speed and safety all passengers and property, offered to it, to their destination along its railroad, unless it has reasonable excuse for not doing so; and that the paramount duty of its agents and employees, in running

a train over said road, is to look first to the safety of the persons and property upon the trains.

7. And if the jury in this case believe from the evidence that the stock sued for was struck and killed or injured by the defendant's locomotive or cars, and that the engineer in charge of the locomotive, with due and proper regard to the paramount obligation which the defendant was under, could not have prevented the locomotive from striking any of said stock, they will find for the defendant.

8. If the jury believe from the evidence that the stock sued for in this case was killed or injured in an enclosed field belonging to plaintiff's intestate, and that the defendant's road was located and passed through said field at the time said stock was killed or injured; and if the jury further believe from the evidence that three discreet, disinterested men, citizens of Livingston county, were appointed by the circuit judge of said county to examine and view the land belonging to plaintiff's intestate through which the defendant's railroad was located, and said viewers assessed the damages resulting to plaintiff's intestate from the location and construction thereof at the sum of six hundred dollars, and that a judgment was entered for the same on the records of this court and no objections were made thereto by plaintiff's intestate, the duty of erecting and maintaining a good and sufficient fence along each side of said railroad through said field thereby devolved upon plaintiff's intestate; and if he neglected to erect and maintain such fence, and the stock sued for entered upon defendant's railroad for want of the same, and were killed or crippled while therein, they will find for the defendant.

The court refused all of defendant's instructions except the third.

Carr, for appellant.

I. The respondent, as administratrix of Joseph Clark, deceased, is not the proper party to maintain the suit for the injuries alleged in the second and fourth counts, viz: for

building the embankment in said intestate's field, whereby the water was caused to overflow said field, and for depositing the heaps of earth in said intestate's private way across his land. The reason is, that said acts are injuries to the inheritance, and the heir is the proper party to prosecute the suit for such injury; being an injury done to the realty, the administratrix cannot maintain a suit for it.

II. The causes of action stated in the first, third and fifth counts are improperly united in the same suit with the causes of action stated in the second and fourth counts. The reason is, that the first, third and fifth counts are for damages to the personalty, and the second and fourth counts are for damages due to the realty. This is a misjoinder of actions; they do not all belong to the same class. (R. C. 1855, p. 1228, art. 6, § 2.) Besides, the first and third counts are actions of trespass for double damages on the statute to prevent "Trespases," and the other counts are either actions on the case or trespass. This is an improper uniting of actions in the same petition. (Lamport v. Abbott, 12 How. 340; Alger v. Scovill, 6 How. 131; 1 Whit. Pr. 672; Cooper v. Bissell, 16 Johns. 146; Hall v. Fisher, 20 Barb. 441; Williams v. Hingham, &c., 4 Pick. 341; Frazer v. Roberts, 32 Mo. 457; Highland Turnpike Co. v. McKean, 11 Johns. 109; Duchess Manuf'g Co., 14 Johns. 238; 9 Cow. 151.)

III. The court below improperly refused to instruct the jury to find for the appellant on the first four counts in the petition, at the close of the respondent's evidence, for the reason that the respondent had not adduced sufficient evidence to support said counts. An instruction of this kind admits all the facts to be true, and still the evidence is not sufficient to support the petition. The plaintiff makes out no cause of action; it is in the nature of a demurrer to the evidence. If the plaintiff has failed to adduce sufficient evidence to sustain the allegations in his petition, and the defendant is of that opinion, he has a right to take the opinion of the court in the matter; and if the court is of the same opinion, it is its duty so to instruct the jury, and that

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ends the case. This practice will save the time of the court, the parties, and the witnesses in behalf of the defendant from being examined when there is really no occasion for examining the defendant's witnesses; besides, it will save considerable cost. (Harris v. Woody, 9 Mo. 112; Lee et al. v. David, 11 Mo. 114; Rucker v. Eelings, 7 Mo. 115; Font v. Sabin, 19 Johns. 154; Pratt v. Hull, 13 Johns. 384; Naugatuck R.R. Co. v. Waterbury Button Co., 24 Conn. 468; 25 N. York, 208; 2 Whittaker's Pr., 2d edition, 388 et seq.)

IV. The instructions given to the jury at the close of all the evidence do not properly lay down the law. They enunciate the proposition, that if the fifteen or twenty Irishmen, under Patrick Cochran, whilst grading that part of appellant's road which runs through respondent's intestate's field, threw down or left down the fences, whereby stock got into said field and damaged the corn therein, then the appellant is responsible for all the damage thus done, simply because said Irishmen were working for the benefit of the appellant at the time, and had an engineer on the road at the time whose duty it was to watch the work and see that it was done in conformity with the contract between John Duff & Co. and the appellant, although said engineer had no supervision or control over said Irishmen farther than that he might have them discharged if they did not do their work according to contract. This is not law; the relation of master and servant is the true test of liability. The laborers themselves and their employer, Patrick Cochran, alone are responsible for such damage. (Barry v. City of St. Louis, 17 Mo. 121; Blake v. Ferris et al., 1 Selden, 48; Peck v. Mayor of N. York, 4 Seld. 422; Kelly v. Mayor of N. Y., 1 Kernan, 432; Lockwood v. Mayor of N. Y., 2 Hilton, 66; Chicago City v. Robbins, 3 Black. 418.)

Ray & Woolfolk, for respondent.

The court committed no error. (30 Mo. 374; Am. Railw. Cas., 290; 3 Hill, 531; 2 Denio, 433; Sto. Ag., pp. 452 &

454; Dunlap's Pal. Ag., 296; 23 Pick. 24 & 31; 14 Ills. 85; 30 Mo. 372; Sedg. on Dam., 405-6.)

As to the necessity of erecting and maintaining fences on each side of the road, see R. C. 1855, § 52, p. 487. . As to width of road, or right of way, see R. C. 1855, p. 425, § 29, s. d. 4. Sec. 57 of the "Act to authorize the formation of railroad companies" (R. C. 1855, p. 488) applies the provisions of that act to all "existing" corporations, as well as to those to be afterwards created.

If appellant, its officers, or agents, had a general control over the work done, and could have prevented the laborers under Cochran from throwing and leaving down fences around intestate's field and neglected to do so, they are as much responsible for such neglect as if they had ordered said fence to be left down. The first instruction, therefore, of appellant was not the law.

The appellant was not authorized by its charter to inflict unnecessary damage upon the owners of adjoining land; only the necessary and unavoidable damage resulting from the construction of the railroad were estimated by the viewers. (§§ 7, 8 & 9 of the "Act to incorporate the Louisiana and Columbia R.R.," Jan. 27, 1837, and the "Act to amend an act entitled 'An act to incorporate the Han. & St. Jo. R.R. Co.," Feb. 23, 1853, § 5.) As to the powers of railroad companies, see R. C. 1855, p. 485, § 29.

Section 2d of "An act to amend an act entitled 'An act to incorporate the Hannibal & St. Jo. R.R. Co.," Mar. 3, 1855, gives the company power to cross a private road, but no power to render it unfit for travel by deposits of mud. The railroad company is expressly required to have a bridge erected for crossing the same in all such cases. This provision was in existence at the time damages were assessed, and it is not to be presumed that respondent's intestate was compensated by the viewers for damage to his private way, when, if the law, then in force, had been regarded, no damage would have resulted.

The duty to erect fences on the sides of its road, where

the same passes through enclosed fields, was imposed by the laws of the State. (R. C. 1855, p. 487, § 52 & 57.) This law was in existence at the time damages were assessed by the viewers, and it is not to be presumed that they estimated the labor of maintaining fences on the sides of the road in their damages, as the railroad company was required to erect and maintain the fences. This law was not inconsistent or conflicting with the charter of the railroad company. (R. C. 1845, p. 482, § 7; Ang. & Ames on Corp., § 767.)

The cases cited by appellant on the question of damages having been assessed by viewers, are inapplicable, from the fact that in those cases the laws requiring the railroad to maintain fences on the sides of its road were subsequent to the assessment of damages, and naturally this duty was presumed to have been embraced in the assessment of damages. In this case the assessment was made under the law then in force, and therefore not embraced in the assessment of damages.

HOLMES, Judge, delivered the opinion of the court.

This action was brought to the May term, 1860, of the Circuit Court of Livingston county, for the recovery of damages done to the plaintiff's property in process of the construction of the Hannibal and St. Joseph railroad through the plaintiff's enclosed farm, and for killing cattle in the years 1857 to 1860. The amended petition on which the case was tried contained five counts: the first, for damages occasioned in 1857 by the laborers on the road throwing down the fences to a greater width than the strip of land condemned for the use of the railroad, without, at the same time, fencing the railroad land on either side, whereby cattle and hogs entered into the plaintiff's fields and destroyed his growing corn, and double damages were claimed under the act of Nov. 17, 1855, concerning Trespasses; the second, for damages from the accumulation and flowage of water on a small part of the farm, caused by the raised embankment of the road-bed on the western side of the farm, in 1859; the third, for dama-

ges done, in the spring of 1859, to a field of growing wheat, under like circumstances as in the first count, for which double damages were claimed under the "Act concerning trespasses"; the fourth, for damages occasioned in 1857 by the workmen on the road in depositing excavated earth across the plaintiff's private way on a part of the farm lying beyond the line of the land condemned for the use of the railroad; and the fifth count was for damages in killing cattle on three different occasions—that is to say, two calves of the value of \$8, in October, 1859; one Durham cow of the value of \$25, and one sow of the value of \$12, in the month of March, 1860—by running over them with the locomotives, while straying upon the track.

The answer to the first count denied that the trespasses therein mentioned were committed by the agents, employees or servants of the corporation; it set up as a defence to the second count, that the company had the power to construct their road, and the right of way, by their charter, and that the land taken for the use of the railroad had been duly condemned, taking into consideration the advantages and disadvantages to the land of the plaintiff, and that the compensation assessed had been paid to him; it denied the material allegations of the third and fourth counts, and to the fifth, it pleaded the right of way so acquired, and that it was the duty of the plaintiff to fence his own land, the cost thereof having been included in the compensation made; and further, that the animals were killed without any negligence, unskillfulness or misconduct on the part of the defendant.

On the trial of the cause in November, 1864, it appeared in evidence that the laborers and workmen engaged in constructing that part of the road, and by whom the several trespasses complained of in the first four counts were committed, were employed by one Patrick Cochran, a sub-contractor under Shea, Griffin & Paris, who were sub-contractors under John Duff & Co., who were the principal contractors with the corporation for the construction of the whole road from Hannibal to St. Joseph; that Cochran employed

under him some fifteen to twenty-five hands, who were selected, superintended, controlled, directed and paid by himself; and that the corporation employed an engineer on that division of the road, who had a general superintendence over the construction of the road, and whose duty it was to see that the work was done according to contract. It further appeared that the several acts of trespass and the injuries complained of were committed by the employees and servants of Cochran, the sub-contractor, and under his immediate direction and control, and not by any express direction of any officer, agent, employee or servant of the company otherwise; that the fences of the plaintiff were taken down to a greater extent than the width of the railroad land, and that no fences had been erected by the company on either side of their road through this farm; that the plaintiff's fences were poor in other parts, and that cattle and hogs got into the fields by the openings for the railroad, and also sometimes broke through the fences in other places. And it appeared that, by reason of the raised embankment of the road-bed and the natural configuration of the ground, water accumulated against the same on the southern side, overflowing an acre or two of the plaintiff's land, and rendering it marshy and unfit for cultivation, notwithstanding the engineer had, at the instance of the plaintiff, caused a pipe to be run through, underneath the embankment, for the purpose of draining off the water. There was much other evidence, on either side, relating to the details of the transactions and the extent of the damage sustained, and some admissions of facts not disputed, which it will be unnecessary to notice here.

Some thirteen instructions were given for the plaintiff, and ten refused for the defendant, and the jury rendered a general verdict for entire damages, the sum of \$1,564 for the plaintiff. There was a motion for a new trial and a motion in arrest of judgment, and the case comes up by appeal.

It was objected by the defendant that there was a misjoinder of the several causes of action stated in the petition, for the reason that they did not all belong to one and the same

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class. The third clause of section 2, Article VI. of the act concerning Practice (R. C. 1855, p. 1228), provides that "several causes of action founded on injuries with or without force to person and property" may be joined in the same petition. This class would seem to include all injuries whatever to person or property, whether real or personal, direct or consequential, and whether the damages are given by statute or by common law, single or double; and it will certainly include all actions of trespass or case under the old practice. We are of opinion that the petition was not objectionable for misjoinder of counts; but we would not be understood as deciding that this was a proper case for damages under the "Act concerning trespasses." But the fifth count contains three distinct causes of action combined in one count, being for so many distinct and several trespasses or injuries on different occasions and at times far apart. This count is for this reason clearly bad on demurrer, or on motion in arrest. It has been decided by this court in several cases, that distinct causes of action cannot be combined in one and the same count. (McCoy v. Yager, 84 Mo. 134.) Moreover, the damages claimed on two of these occasions are less than twenty dollars and below the concurrent jurisdiction of the Circuit Court in such cases. (R. C. 1855, p. 583, § 8.)

Again, the verdict is entire for one total amount of damages, without any separate finding of the issues on the several counts. On this verdict, it is impossible for the court to know how the issues were found, or on which of the counts the damages were assessed, or how much on each one. Such a verdict is clearly erroneous. There should have been a separate finding and a distinct assessment of the damages on each count. This is assigned as one of the grounds for the motion in arrest, and for this reason alone it should have been sustained. (Talbot v. Jones, 5 Mo. 217; Mooney v. Kennett, 19 Mo. 551; Fenwick v. Logan, 1 Mo. 401; Hickman v. Boyd, 1 Mo. 495; 21 Mo. 149.)

It appears that, at the close of the plaintiff's case, the de-

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defendant moved the court to non-suit the plaintiff on the first four counts of the petition, because they were not sustained by the evidence offered, and his motion was overruled. In this there was no error. The court cannot compel the plaintiff to submit to a non-suit. If the plaintiff refuse to suffer a non-suit and insists upon submitting his case to the jury, the court will enforce its opinion by awarding a new trial, if the jury should disregard the law or the instructions of the court, and find a verdict for the plaintiff. (Wells v. Gaty, 8 Mo. 681; Perrin v. Wilson, 9 Mo. 147; Wells v. Biddle, 9 Mo. 158; Clark v. St. Boat "Mound City," 9 Mo. 145.)

Defendant then asked the court to instruct the jury on each of said four counts to the effect that the plaintiff had not adduced sufficient evidence to support them, and that the jury should find for the defendant on those counts. These instructions were refused by the court for the reason (as stated in the bill of exceptions) that the defendant was not ready to close his case and submit the cause to the jury. We do not purpose, in this case, to examine into the evidence for the purpose of determining whether or not these instructions should have been given. The court below may have been justified in refusing them on the ground that there was some evidence, however slight, which was competent to go to the jury; on this we do not undertake to decide. But the reason assigned for the refusal, in the bill of exceptions, can hardly be considered sufficient. We suppose it may have been founded upon the 47th section of Article X. of the Practice Act (R. C. 1855, p. 1268), which provides that "where the evidence is concluded, and before the case is argued or submitted to the jury, either party may move the court to give instructions on any point of law arising in the cause." It is evident that the object of this section was to authorize the giving of written instructions, and to require the court to give them, at the instance of either party, at the conclusion of the evidence or before submitting the cause to the jury, rather than to fix the exact order of practice; and

when the plaintiff has concluded his evidence, it may very well be said that the evidence is concluded for all the purposes of such instructions as these. We do not see any propriety in requiring the defendant to proceed with his defence, before the court should be called upon to pass on them, nor do we think that such was the reason or intent of the statute. The court should have given or refused the instructions, when so required, at the conclusion of the plaintiff's case. It is the common practice and well sustained by authority, ancient and modern, and by several decisions of this court, when the plaintiff has offered no evidence which would be sufficient in law, if true, to warrant the jury in finding a verdict in his favor, to instruct the jury to find for the defendant; in such case there is nothing else for the jury to do. (*Harris v. Woody*, 9 Mo. 112; *Lee v. David*, 11 Mo. 114.)

Another point made by the defendant is, that a part of the damages sued for was for injuries done to the realty, and that the heir only, and not the administratrix, can maintain a suit for such damages. There is obviously nothing in this objection. The whole cause of action had accrued before the death of Joseph Clark, and upon his death being suggested, his administratrix and legal representative was properly substituted as plaintiff in the suit, under the statute relating to abatement of suits, by force of which the cause of action survives.

As the case will have to be remanded for another trial, it will not be worth while for us to review the instructions in detail; but it will be proper to indicate our opinion on the main questions involved in them for the guidance of the parties and the court below. Several of the instructions given for the plaintiff proceed upon the idea that the defendant is liable for the trespasses and injuries committed by the laborers and workmen employed in the construction of the road by the sub-contractor Patrick Cochran, while under his exclusive direction and control as his employees and servants. In this respect we think they were erroneous. This

position appears to be well sustained by all the later and better authorities. In the case of *Lowell v. Bost. & Low. R.R. Co.* (23 Pick. 24), a contrary doctrine seems to have been held, and the case of *Bush v. Steinman* (1 Bos. & P. 404), cited as authority; but these cases, so far as they can be considered as bearing upon a case like this, have been overruled by numerous later decisions, both in this country and in England. In the case of *Barry v. City of St. Louis* (17 Mo. 121), the authorities were reviewed at large, and it was held that the City was not liable for injuries occasioned by the negligence of workmen employed by a contractor on the Biddle-street sewer, and that the relation of master and servant in such cases did not extend beyond the contractor. The liability depends on this relation, and the principle of *respondeat superior* applies to the contractor who employs the men and whose servants they are, but not to the corporation with which the original contract is made. In this case it clearly appeared that the laborers, by whom it was proved that the trespasses and injuries were committed, were the employees and servants of Patrick Cochran, the sub-contractor, and it makes no difference that there was an engineer of the company on that division of the road, whose duty it was merely to superintend the general progress of the work of construction, and to see that it was done according to the contract made by the corporation with the principal contractors. He had no immediate control over the men employed by the sub-contractor; the corporation itself had none. The principle of *respondeat superior*, in such case, applies to the sub-contractor only; as between him and the laborers, his employees, the relation of master and servant exists and it ceases with him. There cannot be but one responsible master for the same servant, and where that relation ceases, the liability ends also. (*Blake v. Ferris*, 1 Seld. 48.)

Other instructions given for the plaintiff assumed as their basis, that the defendant was liable for the damages done to the growing crops by cattle and hogs getting into the fields

through the openings in the fences of the plaintiff which had been made by the workmen on the road, in the progress of their work, on the ground that the statutes make it the duty of the railroad companies to fence in their railroads where they run through enclosed fields. These instructions also proceeded upon a mistaken view of the law of this subject. The statute concerning Railroad Associations (R. C. 1855, § 52) requires railroad corporations to erect and maintain fences on the sides of their roads, and cattle-guards also, where they pass through enclosed fields, "suitable and sufficient to prevent cattle and animals from getting on the railroad," and provides that until such fences and cattle-guards are made, the corporation shall be liable, without proof of negligence, for all damages done by their agents or engines to animals thereon; but that, after such fences and guards are made, they shall not be liable for any such damages unless "negligently or wilfully done." This section was so amended in 1864, as to authorize the owner of enclosed fields to build such fences at the expense of the railroad company, but without changing the object or principle of the act. It was held in *Gorman v. Pacific Railroad* (26 Mo. 441), that this section applied to that company as not being inconsistent with their previous charter; nor do we find anything in the charter of this defendant which would bring it within the exception of the 57th section of the act concerning Railroad Associations. The act concerning "Damages" also, (R. C. 1855, p. 647, § 5,) proceeding on the same principle, provides, in like manner, that when animals are killed by cars or engines on any railroad, the owner may recover the value in damages, without any proof of negligence, unskilfulness or misconduct, unless the accident occurred on a portion of the road enclosed by a lawful fence, or in the crossing of a public highway. But all these acts have for their object and scope the protection of the railroad, the safety of passengers and trains, and the prevention of accidents and injuries to cattle or other animals straying upon the track. They require the company to fence the railroad in and to fence the

animals out; they do not require the company to enclose the farms or fields of private land-owners for their benefit, nor for any other purpose. Nor do they impose on the company any absolute obligation even to fence the railroad in; their effect is only to make the corporation liable to the owners of cattle or other animals for injuries done to them when straying upon the track, without any proof of negligence, in case they fail to erect such fences. The instructions in question seem to be framed upon the assumption that the railroad company was bound by these statutes to fence in the farms and fields of the private land-owners against the cattle and animals of other proprietors, their neighbors—at least, so far as that would be accomplished by erecting fences along the railroad—and that, unless that were done, the company would be liable for all the damages which the plaintiff's growing crops might suffer by reason of the cattle and hogs of other persons getting into his fields. But, plainly, it belongs to the land-owner himself to fence his own farm, and enclose his own fields, at his own expense, against all intrusion from without.

At common law, it was the duty of every land-owner to keep his cattle within his own enclosures, and the liability of one owner to another for damages done by straying cattle, turned much upon this principle; but this rule has been considerably modified by operation of the statutes of this State. Aside from the statute, the railroad company would not be bound to fence their road against stray cattle, nor would they be liable for killing such cattle upon their tracks without proof of negligence on their part; on the contrary, the owners of cattle might be liable for damages done to the railroad, or to trains and passengers, by reason of such cattle being negligently allowed to stray upon the railroad. The statutes so far change all this as to relieve the owners from the obligation to keep their cattle within enclosures, and to make the railroad corporation liable for killing cattle upon the track, without proof of negligence on their part, unless they fence in the railroad where it runs through en-

closed fields; but they go no further. In Spanish times here in Missouri, the custom sometimes was to enclose the cattle within the towns and commons, and to fence the cultivated fields out; but the habit has been in modern times to enclose the fields, fencing the cattle out, with free range upon the prairie or the highway. And this state of things seems to have been recognized, if not established, by the act concerning "Inclosures," (R. C. 1855, p. 844,) which requires all fields and enclosures to be enclosed by the owners with a prescribed lawful fence against the cattle and animals of whatever other proprietor; and it has been held that the owners of cattle in this State were not bound by law to keep their cattle within enclosures. In this view of the subject, it is apparent that the principal motive of these railroad acts is the security of such cattle as well as the protection of the railroad, and the safety of the persons and lives of passengers. (*Gorman v. Pacific Railroad*, 26 Mo. 441.) But it cannot be inferred that the railroad company is bound to build fences for the enclosure of the farms and fields of private land-owners, nor that it incurs any liability to such owners by reason of any failure to erect and maintain the fences required by these railroad acts, otherwise than by killing cattle on the track.

Another question presented by the instructions was, to what extent the condemnation of the land for the use of the railroad, and the compensation paid for it, taking into consideration the advantages and disadvantages to the land-owner, covered and compensated the damage and injury done to the proprietor in consequence of the condemnation, and the construction of the railroad through his land, and how far the rights thus conferred upon the corporation extend. We need not undertake to answer these questions here further than a proper understanding of the law of this case may require. There was no question but that the corporation had thus acquired the right of way, under their charter and the laws of the State, nor that they had power to construct their road through this land, and to do all things that

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might be necessary and proper for that purpose. And it is clear that to the extent of the powers and rights acquired by the corporation under the laws, and within their proper scope, neither the corporation nor the contractors, nor the workmen under them, can be regarded trespassers or wrongdoers. (1 Amer. Railw. Cas. 206; Aldrich v. Cheshire R.R. Co., 1 Fos., N. H., 359.) They had the lawful power and the right to construct the railroad through the plaintiff's farm, and to pull down the plaintiff's fences for that purpose, and to raise embankments to the necessary grade for the road-bed. Whatever damage resulted to the plaintiff from these acts, and all disadvantages thereby occasioned to his property, must be considered as included in the compensation awarded and paid; and any inconvenience, or diminution of value, or other injury to the plaintiff's property beyond this, must now be treated as *damnum absque injuria*. (Parker v. Bost. & M. R.R. Co., 3 Cush. 107; 1 Amer. Railw. Cas. 547.)

Now so far as the construction of the railroad through the plaintiff's land imposed upon him the necessity of changing fences, or of building new and additional fences, in order to enclose his fields against the intrusion of cattle and animals belonging to other persons, he was bound to make those changes, and build such additional fences himself at his own expense; and all probable and necessary expense for that purpose, being a proper subject for consideration in the assessment of damages to be awarded as compensation, must be taken as having been included in the compensation paid. The corporation was not bound by any law to build fences for any such purpose; though it might well happen that if the company did fence in their road as required by statute for other purposes, by erecting fences along either side of their road, such fences when built might also serve in part, incidentally, to enclose the plaintiff's fields; but the only consequence that could be visited upon the company, if they failed to erect such fences, would be, that they would thereby render the corporation liable for

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the value of cattle and animals killed upon their track without any proof of negligence, but not at all for the destruction of the plaintiff's crops by the intrusion of the neighbor's cattle into his fields. It was insisted on the part of the plaintiff that the fences of the plaintiff had been thrown down to a greater extent than the width of the land condemned, or than was necessary for the purpose of constructing the railroad; but if this were so, it was the wrongful act and trespass of the sub-contractor and his servants, and wholly unauthorized by the corporation; and for any injury of this nature, as we have seen, they alone can be held responsible. And the same thing may be said in relation to the complaint that the laborers under Cochran had deposited earth upon the plaintiff's land beyond the line of the land condemned for the use of the railroad.

Again, the plaintiff complains in the second count, that a portion of his farm was injured by flowage of water occasioned by the raised embankment of the road-bed; but it is not alleged in the petition that this part of the work was constructed in a negligent, unskilful or improper manner. The answer set up as a defence to this count, that the company, by their charter, had power to construct their railroad in this manner; had acquired the right of way by condemnation of the land, and had paid the compensation assessed, including the advantages and disadvantages to the plaintiff's property. It did not appear that there was any natural water-course there, which might have required a bridge or culvert to be built; but there was some evidence, that, upon complaint of the plaintiff on account of the accumulation of water on one side of the embankment, owing to the situation and configuration of the ground, the engineer had caused a pipe to be put through the embankment for the purpose of draining off the water, which did not prove effectual, and some one or two acres became too wet and marshy for cultivation. On this point the court gave the following instruction: "That if laborers, agents or servants in the employ of the defendant, while grading said road, negligently threw up

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embankments of earth on the west side of said farm of plaintiff, thereby damming up the water, and causing the same to change its channel and overflow a part of said field outside of defendant's right of way, and thereby rendered the same unfit for cultivation, the jury may assess the damages thereby sustained."

This instruction should have been refused. The issue made on this count did not involve any question of negligence. The evidence tended to sustain the defence set up in the answer, and the finding should have been confined to the facts involved in the issue. (*Alison v. Darton*, 24 Mo. 343.) In the absence of any negligence, unskilfulness, or mismanagement in the construction of the embankment or the road-bed, the injury thereby done to the plaintiff's property must be considered as the natural and necessary consequence of what the corporation had acquired the lawful right to do; and such damages must be taken to have been included in the compensation assessed, or it was *damnum absque injuria*. The instruction was further objectionable as impliedly assuming that the corporation was liable for the negligent acts of the laborers, though employed under the sub-contractor. But the defendant cannot be held responsible for any damages occasioned by the negligence or by the trespasses of the employees and servants of the sub-contractor, whether in constructing the embankment, in taking down the plaintiff's fences, or in depositing earth upon his land.

Not having erected the fences required by the statute, the defendant would have been clearly liable, upon a count properly framed and coming within the jurisdiction of the court, for the value of the cattle killed on the track of the railroad, without any proof of negligence. The defence set up in the answer to the fifth count was not a valid defence, and the instructions asked upon it were rightly refused.

The other judges concurring, the judgment is reversed and the cause remanded.

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EDMUND P. ARMSTRONG, Respondent, v. JAMES J. ARMSTRONG,
Appellant.

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Negotiable Note—Endorser.—To render the endorser of a negotiable promissory note endorsed after maturity liable as endorser to the holder, payment must be demanded of the maker, and notice of such demand and refusal of payment must be given to the endorser.

Appeal from Clay Circuit Court.

Woodson & Jones, for appellant.

The error relied upon in this court for a reversal, is the ruling of the court below, that no demand of payment of the maker of said note, or of notice of non-payment by the maker to the endorser thereof, was necessary to enable the plaintiff below to recover a judgment against the endorser.

The court is referred to the case of Davis v. Francisco, 11 Mo. 573; McKinney v. Crawford, 8 Sergt. & R. 351; Berry v. Robinson, 9 Johns. 121; Rugby v. Davidson, Cons. Ct. 33; Smith's Merc. Law, 303-4; Pars. on Cont. 231-2.

H. M. & A. H. Vories, for respondent.

The note being over due when endorsed, it stood upon the same ground with a non-negotiable note, except that offsets could not perhaps be pleaded to it; and when the holder ascertained that the maker was insolvent, he was not bound to proceed any further, but at once might proceed against the endorser (or, in such case, more properly assignor) of said note and recover.

LOVELACE, Judge, delivered the opinion of the court.

This is an action to recover the amount of a negotiable promissory note, endorsed by the defendant to the plaintiff after maturity. It was tried in the court below upon an agreed statement of the facts, which admit that no demand was ever made of the maker, and no notice ever given to the endorser, who is the defendant here, of a demand and refusal. The court gave judgment against the defendant for

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the amount of the note, to reverse which the case comes here by appeal.

We know of no principle of law upon which the judgment of the court below can be sustained. The statute provides that actions on negotiable notes may be maintained against the makers and endorsers respectively in like manner as in cases of inland bills of exchange, and not otherwise. (R. C. 1855, p. 296, § 16.) The law is too well settled to admit of doubt, that to hold the endorser of a negotiable promissory note, or a bill of exchange, liable, it is necessary that there should be a demand of payment made of the maker in reasonable time and reasonable notice of the refusal given to the endorser, otherwise he will be discharged; and this rule seems to apply with equal force to bills transferred after maturity. (Pars. on Cont. 256.) In the case of *Davis v. Francisco* (11 Mo. 578), it was held by this court that notice was necessary to hold the endorser of a negotiable promissory note liable, endorsed after maturity, but that the death of the maker at the time of endorsement might excuse the demand. Judge Scott, in a dissenting opinion, said that it was equivalent to a new bill payable at sight; and to hold the endorser liable, a demand and notice were necessary under all circumstances. In *McKenney v. Crawford*, it is said that there is no difference, so far as the endorser is concerned, between an assignment before and after maturity. (*McKenney v. Crawford*, 8 Sergt. & R. 851; *Rugby v. Davidson*, 2 S. C., Cons. R. 33.)

The other judges concurring, the judgment is reversed and the cause remanded.

GENSON FREIDENHEIT, Defendant in Error, v. JOHN EDMUNDSON et als., Plaintiffs in Error.

Trespass—Damages.—"Exemplary damages" would seem to mean, in the ordinary and proper sense of the words, such damages as would be a good round compensation, and an adequate recompense for the injury sustained, and

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such as might serve for a wholesome example to others in like cases. Where the defendants, forming part of a body of armed men, forcibly broke and entered the plaintiff's store, putting him in bodily fear, and took and carried away a large portion of the plaintiff's stock of goods, injuring his business, the mere value of the goods taken with interest thereon is not the proper measure of damages.

Error to Buchanan Court of Common Pleas.

The court instructed the jury on plaintiff's motion :

1. If the jury believe from the evidence that defendants with other persons wilfully and intentionally broke open the store-house of the plaintiff, and wilfully and intentionally took and carried away therefrom divers articles of clothing or merchandise, forcibly and against the will of the plaintiff, they will find for the plaintiff the value of the goods so taken with interest thereon from the time the same were taken, and they may also find such further sum as to them may seem right in the way of exemplary damages, in all not exceeding five thousand dollars, the amount set forth in plaintiff's petition.

2. If the defendants, or either of them, were present and encouraged by words or otherwise others in the taking of said goods, they are as liable as if they actually took the goods themselves.

The court gave the above instructions, to which the defendants excepted.

The defendants then moved the court to instruct the jury as follows :

1. If the jury believe from the evidence that defendants either entered plaintiff's store and took his goods therefrom, or aided and encouraged others in so doing, they will find for the defendants, or such of them as are not guilty of so taking said goods, or aiding others in doing the same.

2. If the jury find for the plaintiff, the measure of damages is the value of the goods taken with interest thereon, from the time the same were taken, at the rate of six per cent. per annum.

The court gave the first instruction and overruled the

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second, to which opinion overruling the second the defendants excepted.

H. M. & A. H. Vories, for plaintiffs in error, cited *Dozier v. Germain*, 30 Mo. 216, and *Goetz v. Ambs*, 22 Mo. 170.

Ensworth & Grubbe, for defendant in error.

The respondent takes the position that the court below ruled right in each and all of its rulings aforesaid, and in support of his position cites the following authorities: 27 Mo. 39-4; 14 Mo. 110; *Hardin's R.*, Ky., 586; 1 Lit. Select Cas. 81; 1 Bibb, 248; 4 Lit. 162; 3 Mars. 455-6; 7 Mon. 395; 8 B. Mon. 432; 1 Mass. 11; 3 Wend. 391; 11 Pick. 379; 2 Gilm. 432; *Sedg. on Dam.* 38 & 458, and Appendix 622, and authorities there cited.

HOLMES, Judge, delivered the opinion of the court.

This case comes up by writ of error from the Buchanan Court of Common Pleas. The amended petition on which the case was tried, filed at the January term, 1864, states that the defendants, conspiring together and forming a design to resist the laws of the United States, wrongfully and with force of arms entered the plaintiff's store, while he was present, and took and carried away a large quantity of ready made clothing, taken promiscuously from his stock of goods, (the precise number and kind of the articles he cannot recollect, having been prevented from taking an inventory of them), and of about the value of twenty-five hundred dollars; and that said defendants and others unknown to him were armed with implements of war, and put the plaintiff in fear of his life, to his great damage in the loss of his property, the breaking up of his stock, and personal injury in the sum of five thousand dollars, for which he asks judgment. The answers of the defendants denied the allegations of the petition, and at the June term, 1865, there was a trial and verdict for \$4,500 damages for the plaintiff. The defendants moved for a new trial chiefly on the ground that the instructions given and refused were erroneous, and that the dama-

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ges were excessive. At the suggestion of the court, the plaintiff entered a *remittitur* of one thousand dollars, and the motion for a new trial was overruled.

The evidence tended to prove the facts stated in the petition, and it appeared that the defendants, with others, engaged in raising military companies for the purpose of joining Sterling Price's army, and making war on the United States and the provisional government of this State, and, armed with military weapons, forcibly broke open the doors of the plaintiff's store, though shut up by him, and, putting his life in danger, abstracted several wagon loads of clothing, the exact value of which the witnesses could not state. One witness saw seven loads brought on the shoulders of men, and thrown into two wagons, the value of which he thought might be \$800 or \$1,000; and other witnesses saw goods brought out and thrown into six different wagons, the value of which they could not state. And it was admitted that the defendants took, or aided in taking, the goods in question.

The court instructed the jury to the effect, that, if the defendants forcibly broke open the plaintiff's store, and carried away his goods, they would find for the plaintiff the value of the goods so taken, with interest thereon from the time the same were taken, and that they might also find such further sum as to them might seem right in the way of exemplary damages, in all not to exceed the amount claimed in the petition; and refused to instruct for the defendant, that the measure of damages was the value of the goods taken, with interest thereon from the time the same were taken at the rate of six per cent. per annum. It is insisted that there was error in giving and refusing these instructions, and that the damages are excessive.

On the issues made, the question for the jury was, what amount of damages, not exceeding the sum claimed, would be a full and complete compensation, recompense, or satisfaction for the injury sustained by the plaintiff. (2 Greenl. Ev., § 258.) The damages must be commensurate with

the injury. The defendants claim here that the value of the goods taken, and interest thereon, shall be taken as the true measure of damages in such case. It is plain that this would fall far short of covering the whole extent of the issue referred to the jury, which involved the question, how much damage the plaintiff had suffered by the whole injury, and not merely the actual loss in the value of the goods taken. They not only took his goods, but broke open his doors with armed force, putting him in fear of bodily harm and threatening his life, if he resisted, and broke up his stock, and injured his business. He was entitled to compensation for all this injury. Accordingly, the court instructed the jury that they should not only consider the value of the goods and interest, but might add such further sum as to them might seem right in the way of exemplary damages. *Exemplary* damages would seem to mean, in the ordinary and proper sense of the word, such damages as would be a good round compensation, and an adequate recompense, for the injury sustained, and such as might serve for a wholesome example to others in like cases. As we conceive, this does not go beyond the sense of the rule laid down by Greenleaf, and certainly comes within the doctrine maintained by Sedgwick. (Sedg. on Dam. 38 & 453-4.) The jury may give damages beyond the value of the goods, for breaking and entering the store, seizing his property, putting his person in danger, breaking up his stock and injuring his business, and greatly annoying and disturbing him. (2 Greenl. Ev. § 253 & n.; 2 *id.*, p. 257.) The more unsettled question, and what appears to be the principal thing in dispute between the authors above cited, whether the jury may, in any case, award merely vindictive and punitive damages, by way of punishing the defendant, rather than compensatory, the plaintiff proceeding on the ground that the general interest and good of society demand such punishment, does not necessarily arise in this case; and we are not to be understood as sanctioning a principle which, by the nature of it, would seem to belong rather to the domain of criminal

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than civil jurisprudence. We think there was no error in giving or refusing instructions. (*Corwin v. Walton*, 18 Mo. 71; *Walker v. Borland*, 21 Mo. 289; *Goetz v. Ambs*, 27 Mo. 28.)

Touching the amount of the damages, it was the province of the jury to determine that, on the evidence before them and in view of all the circumstances of the case, and the plaintiff having remitted a part of the verdict at the instance of the court below, we discover nothing in the case which would justify us in saying that the remainder was so excessive as to call for the interference of this court, or, indeed, that they were any more than enough. (*Woodson v. Scott*, 20 Mo. 272; *Wells v. Sanger*, 21 Mo. 354.)

Judgment affirmed. The other judges concur.

[END OF AUGUST TERM.]



CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,

SPECIAL SEPTEMBER TERM, 1865, AT ST. LOUIS.

36 227
46a 227
36 228
141 79
36 232
1153 111
36 232
84a 668

JAMES S. THOMAS, Plaintiff, *v.* ANDREW W. MEAD AND JAMES
C. MOODEY, Defendants.*

1. *Governor — Executive Power — Process.*—The Governor, representing the sovereign executive power in the State, is always virtually present in his courts for the purpose of executing the mandates and process of the courts, whenever the power of the marshal and an ordinary *posse* may not be sufficient for the purpose, or when the peace and dignity of the State may so require.
2. *Prohibition — Supreme Court.*—The Supreme Court has jurisdiction and power to issue a writ of prohibition; it is invested by the Constitution with a general superintending control over all inferior courts in the State, and with original jurisdiction to issue writs of *Habeas Corpus*, *Mandamus*, *Quo warrant*, *Certiorari*, and other original remedial writs, and to hear and determine the same. In respect of pre-eminence and power, it holds a position under the Constitution analogous to that of the King's Bench in England, and will keep all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined be

* On account of the public interest taken in this case, and the important principles involved, the proceedings are given at large. The opinion of Judge Moodey upon dismissing the original suit, is for the same reasons added in a note at the end of the case. Some comments upon the questions involved in the case will be found in 18 Amer. Law Reg., Oct. 1865, p. 705.

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fore it, or prohibit their progress by law. A "Prohibition" is an original remedial writ, and was provided by the Common Law as a remedy for encroachment of jurisdiction. It is directed to the judge and parties to a suit in an inferior jurisdiction, upon the ground that they have illegally assumed or transgressed the limits of their jurisdiction.

3. *Supreme Court—Constitution.*—It belongs peculiarly to the Supreme Court to put a final construction upon the Constitution and statute laws of the State.
4. *Evidence—Judicial Notice.*—Of the public and official acts of the sovereign political power in the State, or of the executive or judicial departments of the Government, the Circuit Courts are bound to take judicial notice.

At the special term, held in September, A. D. 1865, the plaintiff filed the following petition :

James S. Thomas, plaintiff, v. Andrew W. Mead and James C. Moodey, defendants.—In the Supreme Court of the State of Missouri.—Special Term, Saturday, September 23, 1865.

Now at this day comes James S. Thomas and states to the court here, that on or about the 13th day of June, 1865, one Andrew W. Mead filed in the office of the Clerk of the Circuit Court of St. Louis county, a petition in the nature of a petition for injunction against this petitioner and others, wherein and whereby the said St. Louis Circuit Court was prayed that the defendants in said petition named might be enjoined, restrained and prohibited against touching, handling, seizing, taking, or carrying away any of the records, books and papers of this honorable court, and the seal of said court, without the consent of him, the said Andrew W. Mead. And this petitioner further shows that on the said last named day, the Honorable James C. Moodey, Judge of the said Circuit Court of said county, on the motion of the said Andrew W. Mead, and on hearing and considering the matters stated in said petition, made an order in the nature of a restraining order, whereby the petitioner and the other defendants named in said petition were enjoined, prohibited and restrained according to the prayer of the said petitioner. And the said petitioner further shows that afterwards, to-wit, on the 17th day of said month, in term of the said Circuit Court, upon affidavit of the said Andrew W. Mead, made and filed in said cause, alleging that the said defendants and other parties named in said affidavit had been guilty of disobeying and violating said injunction, issued an order directed to him and to the parties named in said petition and

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affidavit, to show cause why an attachment should not issue against them for contempt in disobeying and violating the said injunction, and said parties were required to appear in said court on the first day of the then next term of said court to answer the said alleged contempt. And the petitioner suggests that all the proceedings aforesaid are in contempt of the State of Missouri and against the Constitution and laws thereof, and to the manifest damage, prejudice and grievance of him the said petitioner; that, by the Constitution and nature of this court, this court is itself, and of necessity must be, the sole and exclusive tribunal to determine who, by the law of the land, is the proper custodian of the records, books and papers of this court, and the seal thereof, and that if the petitioner and other parties named in the said petition and affidavit are guilty, or have been in anywise guilty of, or have conspired to seize, take, and carry away the records, books and papers, and seal of this court, that this court hath full jurisdiction to prevent and restrain the same by proper order, process and decree; and that neither the Circuit Court of St. Louis county and no other inferior tribunal hath, by law, right or authority to determine who is entitled to the custody of the books, records, papers and seal belonging and pertaining to this honorable court. That the proceedings instituted and followed as aforesaid are a direct encroachment upon the authority and jurisdiction of this court, and are in contempt of this honorable court, its authority and dignity, and that under the Constitution and the laws it is made the care of this court that the said Circuit Court, as well as all other inferior courts, keep within the bounds and limits of the several jurisdictions prescribed to them by the laws and statutes of the State: Wherefore, your petitioner prays the remedy of the People's writ of Prohibition to the said Andrew W. Mead, and to the said James C. Moodey, to be directed to prohibit them from pursuing and holding the pleas aforesaid, the premises aforesaid anywise concerning farther before the said Circuit Court. And the said petitioner herewith exhibits to this court an exemplification, under the seal of the said Circuit Court and hand of the clerk thereof, of the record and proceedings had in the said court in the said cause in establishment of the matters stated in his petition.

By HENRY A. CLOVER, Attorney.
R. M. FIELD, SAMUEL KNOX,
of Counsel.

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Andrew W. Mead, plaintiff, v. David Wagner, Walter L. Lovelace, E. H. E. Jamieson, Ferdinand Meier, Nathaniel Clark, James S. Thomas, Bernard Laibold, A. R. Bowman, and John C. Vogel, defendants.—In the St. Louis Circuit Court, September Term, 1865.

The plaintiff, Andrew W. Mead, states that for a long time he has been and now is the Clerk of the Supreme Court of the State of Missouri.

That as such clerk he is lawfully entitled to the custody of all books, records and papers belonging to said court, and to the business and jurisdiction and authority thereof as well as the seal of said court. That said books, records and papers are of inestimable value to the State and the people of Missouri, and to many persons beyond the limits of the State.

That said books, records and papers contain the evidence of rights and titles to every species of property, and have been intended by the laws to be perpetually preserved for the public good.

That it is the duty of the plaintiff to preserve and maintain inviolate all said books, records and papers, and seal, and that no lawful authority exists in any person or persons to disturb his possession or control of the same while he remains clerk of said court.

That he has been informed and believes and verily fears that the defendants have conspired together to seize and carry away from him and from his possession all said records, books and papers, and seal; he says the defendants Wagner and Lovelace, as he has been informed and believes, have advised the defendant Bowman to set up some right to the possession and control thereof, though in fact said Bowman has no such power, authority or right; that the defendants Clark, Jamieson, Thomas, and Meier, as he verily believes, have been solicited to aid in the unlawful seizure and taking away from him said records, books, seal and papers, and he believes that they have colluded and conspired with the other defendants to effect said seizure and dispossession, and he verily believes and fears that the defendants are about forcibly to seize and take and carry away unlawfully from him and from his possession and control the said books, records and papers, and the seal of the said court, and that they will do so unless restrained and enjoined therefrom by the order of this court. The plaintiff states that the said records, books, papers, and seal of court, are so important to the public interests, they have not that peculiar value which

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can be estimated in damages, and that it is not the matter of damages to be recovered from the wrong-doers in such case to which he is advised he should look for redress, but that his duty is to prevent the intended wrong.

And now, therefore, and forasmuch as there is no remedy adequate in the premises save injunction, he prays that said defendants and each of them, and all others though not specially mentioned by name herein, may be enjoined, restrained and prohibited against touching, handling, seizing, taking, or carrying away any of said records, books and papers, and seal of court, without consent of the plaintiff; and that the court will grant to the plaintiff such other and further relief as may be right and proper in the premises, &c.

GLOVER & SHEPLEY, for Plaintiff,

With whom are

SHARP & BROADHEAD, and THOS. T. GANTT.

On the giving of bond, the following writ of injunction was issued :

The State of Missouri to David Wagner, Walter L. Lovelace, E. H. E. Jamieson, Ferdinand Meier, Nathaniel Clark, James S. Thomas, Bernard Laibold, A. R. Bowman and John C. Vogel, and all other persons combining or confederating with them. You and all persons combining or confederating with you, are hereby enjoined, prohibited and restrained against seizing, taking or carrying away, handling, or in any manner meddling with any of the books, records or papers of the Supreme Court of Missouri, or the seal of said court, now in the possession or control of Andrew W. Mead, Esq., clerk of said court, without the permission or consent of said Mead; and herein you will fail not, until the further order of the Circuit Court of St. Louis county.

And on the same day a writ of summons was issued to the parties made defendants.

On the 17th July, 1865, the following affidavit was filed :

Andrew W. Mead v. David Wagner *et als.*—In Circuit Court, St. Louis county, Mo.

The plaintiff, Andrew W. Mead, states that on the 13th June, 1865, the injunction prayed for in this cause issued. That after the same was served on David Wagner, Walter L. Lovelace, Nathaniel Clark, Ferdinand Meier, and James S. Thomas, they, said Wagner, Lovelace, Meyer, Clark and

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Thomas, colluding and conspiring with the other persons hereinafter mentioned—to wit, on the 14th June, 1865—did violate and disobey said injunction by seizing, taking and carrying away illegally and forcibly the books, records and papers, and seal therein mentioned, without permission or consent of affiant; and after full notice of existence of said injunction; and the service thereof had come to the knowledge of R. M. Field, Henry A. Clover, Samuel Knox, E. H. Jamieson, Thomas C. Fletcher, and D. C. Coleman, the said Field, Clover, Knox, Jamieson, Fletcher, and Coleman, on day and year last aforesaid, confederating and colluding with the persons first mentioned, did disobey and violate said injunction by counselling and advising the same, and aiding and abetting the violation thereof; and said Fletcher and Coleman did by force and arms disobey and violate the same as aforesaid; and further affiant saith not.

The plaintiff, Andrew W. Mead, on his oath states, he believes the statement in the above and foregoing to be true as therein set forth.

A. W. MEAD.

Sworn to before me this 17th day of July, 1865.

F. A. H. SCHNEIDER, Clerk.

And on the same day and at the same term, the following order was made herein :

Andrew W. Mead *v.* David Wagner *et als.*

Now, at this day comes the plaintiff by his attorneys, and files an affidavit, from which it appears that David Wagner, Walter L. Lovelace, Nathaniel Clark, Ferdinand Meier, Jas. S. Thomas, R. M. Field, Henry A. Clover, Samuel Knox, E. H. E. Jamieson, Thomas A. Fletcher, and D. C. Coleman, did disobey and violate the injunction heretofore issued herein on the 13th day of June, A. D. 1865. It is therefore ordered by the court, that a summons issue to David Wagner, Walter L. Lovelace, Nathaniel Clark, Ferdinand Meier, James S. Thomas, R. M. Field, Henry A. Clover, Samuel Knox, E. H. E. Jamieson, Thomas C. Fletcher, and D. C. Coleman, commanding them to appear in this court on the first day of the next term thereof, and show cause why an attachment should not issue against them for contempt, in disobeying and violating the injunction heretofore issued on the thirteenth day of June, eighteen hundred and sixty-five, in the above entitled cause.

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On motion of plaintiff, it is ordered by the court that this suit be dismissed as to John C. Vogel.

Upon the papers filed by the plaintiff, and upon his suggestion, the Supreme Court awarded the following rule to show cause :

September 23, 1865.—Now, at this day comes James S. Thomas, by his attorney, and files his motion for a writ of prohibition to be directed to Andrew W. Mead and James C. Moodey, Judge of the Circuit Court of St. Louis county, to prohibit them from further pursuing and holding cognizance of certain pleas in a certain cause, being a petition for an injunction pending in said court, wherein the said Andrew W. Mead is plaintiff, and the said James S. Thomas and others are defendants ; and on reading the record of the proceedings of said suit, and considering said motion, it is ordered by the court that the said parties, Andrew W. Mead and James C. Moodey, appear in this court on Monday the 25th day of September, instant, at 10 o'clock A. M., and show cause, if any they have, why the said writ of prohibition should not issue as prayed for, and that in the meanwhile all further proceedings in said court in said cause be stayed until the further order of this court.

Judge Moodey did not appear to answer the rule.

Clover, Field & Knox, and Sharp, Broadhead and Gantt, for plaintiff.

Glover & Shepley, for defendants.

HOLMES, Judge, delivered the opinion of the court.

Upon the suggestion of the plaintiff, which is filed in this court, accompanied with an exemplification of the petition and proceedings in a certain cause pending in the St. Louis Circuit Court, wherein the said defendant Andrew W. Mead was plaintiff and the said James S. Thomas was one of the defendants, a rule was granted and served upon the defendants herein, requiring them to appear and show cause why the writ of prohibition should not issue to prohibit them from any further proceeding in said cause in the court below. The defendants having failed to appear and show cause

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as required, the plaintiff now asks that the rule be made absolute.

The suggestion states the substance of the petition and proceedings in said cause, and suggests "that all the proceedings aforesaid are in contempt of the State of Missouri, and against the Constitution and laws thereof, and to the manifest damage, prejudice and grievance of him, the said petitioner; that by the constitution and nature of this court, this court is itself and of necessity must be the sole and exclusive tribunal to determine who, by the law of the land, is the proper custodian of the records, books and papers of this court, and the seal thereof; and that if the petitioner and other parties named in the said petition and affidavit are guilty, or have been in any way guilty of, or have conspired to seize, take, and carry away the records, books, papers and seal of this court, that this court hath full jurisdiction to prevent and restrain the same by proper order, process and decree, and that neither the Circuit Court of St. Louis county, nor any other inferior tribunal, hath by law, right or authority to determine who is entitled to the custody of the books, records, papers, and seal, belonging and pertaining to this honorable court. That the proceedings, instituted and followed as aforesaid, are a direct encroachment upon the authority and jurisdiction of this court, and are in contempt of this honorable court, its authority and dignity, and that under the Constitution and the laws it is made the care of this court that the said Circuit Court, as well as all other inferior courts, keep within the bounds and limits of the several jurisdictions prescribed to them by the laws and statutes of the State." And it prays for a writ of prohibition to issue against said defendants to prohibit them from pursuing and holding the pleas aforesaid further before said Circuit Court.

It appears by the exemplification that on the 13th day of June, 1865, the said Andrew W. Mead, as plaintiff, filed his petition in the St. Louis Circuit Court in the nature of a bill in equity for an injunction against David Wagner, Walter

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L. Lovelace, E. H. E. Jamieson, Ferdinand Meier, Nathaniel Clark, James S. Thomas, Bernard Laibold, A. R. Bowman, and John C. Vogel, defendants therein. The petition states that the plaintiff was the Clerk of the Supreme Court, and as such "lawfully entitled to the custody of all books, records and papers belonging to said court, and to the business and jurisdiction and authority thereof as well as the seal of said court;" that said books, records and papers were of inestimable value to the State and to many persons beyond the limits of the State; that it was the duty of the petitioner to preserve the same for the public good, and that "no lawful authority existed in any person or persons to disturb his possession or control of the same while he remains clerk of said court." It further states "that he has been informed and believes and verily fears that the defendants have conspired together to seize and carry away from him and from his possession all said records, books and papers, and seal." He says "the defendants Wagner and Lovelace, as he has been informed and believes, have advised the defendant Bowman to set up some right to the possession and control thereof; that, in fact, said Bowman has no such power, authority or right; that the defendants Clark, Jamieson, Thomas, and Meier, as he verily believes, have been solicited to aid in the unlawful seizure and taking away from him said records, books, seal, and papers; and he believes that they have colluded and conspired with the other defendants to effect said seizure and dispossession, and he verily believes and fears that the defendants are about forcibly to seize, and take, and carry away unlawfully from him and his possession and control the said books, records and papers, and seal of said court, and that they will do so unless restrained and enjoined therefrom by the order of this court." The plaintiff states that the said records, books and papers, and seal of court, are so important to the public interests, they have not that peculiar value which can be estimated in damages to be recovered from the wrong-doers in such case to which he is advised he should look for redress, but that his duty is to

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prevent the wrong." And it concludes with a prayer for an injunction.

It further appears by the copy of the record, that the injunction was granted as prayed, and that afterwards on the 17th day of July, 1865, the said Andrew W. Mead filed an affidavit in said court which reads as follows:

"The plaintiff, Andrew W. Mead, states that on the 13th June, 1865, the injunction prayed for in this cause issued. That after the same was served on David Wagner, Walter L. Lovelace, Nathaniel Clark, Ferdinand Meier, and James S. Thomas, they saw Wagner, Lovelace, Meier, Clark, and Thomas, colluding and conspiring with the other persons hereinafter mentioned, to wit, on the 14th June, 1865, did violate and disobey said injunction by seizing, taking and carrying away, illegally and forcibly, the books, records and papers, and seal therein mentioned, without permission or consent of affiant, and after full notice of existence of said injunction and the service thereof had come to the knowledge of R. M. Field, Henry A. Clover, Samuel Knox, E. H. E. Jamieson, Thomas C. Fletcher, and D. C. Coleman; that said Field, Clover, Knox, Jamieson, Fletcher, and Coleman, on day and year last aforesaid, confederating and colluding with the persons first mentioned, did disobey and violate said injunction by counselling and advising the same, and aiding and abetting the violation thereof, and said Fletcher and Coleman did, by force and arms, disobey and violate the same as aforesaid, and further affiant saith not."

Whereupon the court ordered that a summons issue to the persons named in the affidavit, commanding them to appear and show cause, on the first day of the next term of the court, why an attachment should not issue against them for contempt in disobeying and violating the said injunction.

The matter is to be determined here as it is presented by the suggestion and on the face of the petition and proceedings in the court below, but it will be proper to notice also certain things which the defendants were bound to know without their being expressly stated in the petition.

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By an ordinance of the people of the State of Missouri in Convention assembled, adopted in Convention on the seventeenth day of March, 1865, certain civil offices of this State, and among them the offices of the judges and clerks of the Supreme and Circuit Courts, were absolutely vacated on the first day of May, 1865; and it was therein ordained that the vacated offices should be filled for the remainder of the respective terms thereof by appointment of the Governor. In virtue of this ordinance, and before the filing of said petition in the St. Louis Circuit Court, the Governor of the State, as in duty bound, officially recognizing the action of the sovereign political power in the State, and as head of the Executive Department of the Government, proceeding to carry into effect and operation the changes which had been made in the Constitution of the State by the sovereign people in Convention assembled, had filled by appointment many of the vacated civil offices, and among the rest had appointed and commissioned the honorable David Wagner, and the honorable Walter L. Lovelace, to be judges of the Supreme Court; the honorable James C. Moodey to be judge of the Eighth Judicial Circuit, and Andrew W. Mead to be clerk of the Supreme Court; and when said petition was filed, they had duly qualified and were each and all acting as such civil officers. On the 27th day of May, a special term of the Supreme Court was called by public notice in pursuance of law, to be holden at St. Louis on the twelfth day of June, 1865, and on that day the Supreme Court was in session. On the fourteenth day of June, thereafter, the Governor of the State, by executive and official orders, dispossessed certain usurpers and placed the Supreme Court in possession and control of the court-room, clerk's office, and the records, books, papers and seal of the court, and the court proceeded in the discharge of its public and official duties. All these were public and official acts of the sovereign political power in the State, or of the Executive and Judicial departments of the State Government, which the said Andrew W. Mead, as clerk of the Supreme Court, was

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bound to know and observe, and of which the judge of the St. Louis Circuit Court was bound by the law of the land to take judicial notice. (Luther v. Borden, 7 How., U. S., 39; 1 Greenl. Ev. § 6.)

On the meeting of the Supreme Court at the special term aforesaid, on the twelfth day of June, the said Andrew W. Mead failed to appear in court with the records, books and papers thereof as his official duty required him to do, and positively refused obedience to the orders of the court, and was notoriously resisting and defying its power and authority. This fact was sufficiently disclosed on the very face of his petition; and this conduct was not only a contempt of the Supreme Court, but a high misdemeanor in office by the statute, for which he was liable to immediate suspension from office and to a final trial before this court upon charges to be exhibited by the Attorney General on notice from the judges. (R. C. 1855, p. 334.)

The books, records, papers, and seal of the court, are public property of the State, and belong to the court. The clerk is merely the official keeper of them for the use of the court and the public. He is entitled to the possession of them for this purpose, and for the care and preservation of them, as against other persons having no authority or right to control *them*; but the books, records, and seal, are always to be under the immediate power, direction and control of the court *itself*, no less than the clerk himself. And no other court has any power or jurisdiction over them as such. This results from the very nature and constitution of the court, and is in accordance with general principles of law; and the statute regulating clerks, proceeding upon these principles, expressly declares that the clerk must keep his office at such place as the court shall direct, and there keep the records, papers, seal and property belonging to his office, and there transact his official business. His accounts of expenditure for their care and preservation are to be audited by the court; he cannot remove them without the order of the court, except in case of danger from an invading enemy;

he must be ready at all times to deliver them over to his successor, or to the temporary clerk appointed to receive them, in case of his suspension from office; he is responsible to the court for the official conduct of himself and his deputies; and, if he be guilty of failure of duty or any misdemeanor in office, he is liable to suspension and trial by this court. (R. C. 1855, p. 337.) This court has power by mandamus to compel a clerk who is removed, or whose office is vacated, or any other person, to deliver up the books, records and seal of any court in the State to his successor in office, (1 Chit. Gen. Pr., 292; Tapp. Mand. 99; Rex v. Hopkins, 4 Per. & D. 551,) and much more to control the records, books and seal of the court itself. Here, we have the extraordinary spectacle of a clerk of the court undertaking to ignore and defy the power and authority of the court over its own records, as well as its power and control over him in the discharge of his official duties; and, in addition to all this, he has the presumption while the court is in session, in term time, to file a petition for an injunction in the St. Louis Circuit Court, to restrain the Supreme Court from meddling with their own records, and even to include therein the executive authorities of the State also, by whom the mandates and process of the court are necessarily to be executed, whenever the power of the marshal and an ordinary *posse* may not be sufficient for the purpose, or when the peace and dignity of the State may so require; for the Governor, representing the sovereign executive power in the State, is always virtually present in his courts for that purpose.

This petition and affidavit exhibit the unparalleled effrontery of describing the highest functionaries of the State government, executive and judicial, as merely private and unofficial persons, and treating their official acts as an unlawful conspiracy to dispossess the petitioner of the records, books and seal of the court, to which he had himself by acts of misdemeanor in office ceased to have any right of possession whatever. And when it is considered that the Circuit Court was bound by the law of the land to take judicial no-

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tice of the official character of these persons, and was enabled to see by the face of the petition and affidavit that the acts complained of were done in their official capacities and by virtue of their constitutional and lawful powers, the action of that court in entertaining such a petition, granting an injunction so unprecedented and even proceeding to summon the Governor of the State, and two of the judges of this court, to answer for a feigned contempt in disregarding the restraining order, as they were in duty bound to do in the necessary and proper discharge of their own official functions and duties, might well excite the amazement of all right-thinking persons. There was not the shadow of an equity in the petition, properly considered, on which to ground an injunction at all. It is unnecessary to deny that, in certain cases, an injunction may be granted, mainly on the ground that an immediate and irreparable injury is threatened to be done, for which otherwise there would be no adequate and complete redress; and if a stranger, without right or authority, were unlawfully interfering with the rightful possession by the clerk of the records, books and papers of his office (especially if the court itself were not in session), it is very probable that such a case might arise as would give the Circuit Court jurisdiction to interpose by injunction against such person. But, plainly, on the face of this petition, this was no such case, but only a transparent pretence of such a case. It cannot justly be considered otherwise than as a sheer abuse of the process of injunction. Nor was the petitioner without other adequate remedy at law; for if any unlawful person had got possession of the records, books and papers, he could have applied to the Supreme Court itself, which was then in session, and obtained a *mandamus* for the immediate re-delivery of them, and the officer of the court could have summoned to his aid the whole power of the State, if it had been necessary for the execution of the process. If this were all, and it were simply a case of error in a matter over which the Circuit Court had full jurisdiction, there might be no ground for a probi.

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bition, and the case might have to be left to take the ordinary course for correction of errors, by appeal, or writ of error. But this is not all. It is manifest that the petition and proceedings, on their face, seek to reach by injunction a subject matter over which the Circuit Court has no jurisdiction by injunction or otherwise, namely, the control of this court over its own records, books and papers, and seal, and to disorganize and depose the court itself, by making a majority of the judges parties to a feigned cause in which they could not sit on appeal or writ of error, and by effectually depriving the court of the means and power of performing its functions. Such a proceeding, if not to be summarily treated as a high-handed contempt of the authority and dignity of the court, is certainly an unprecedented and altogether unwarrantable encroachment upon the proper jurisdiction of the Supreme Court. In this respect, we think the proceedings in the court below clearly transgress and exceed the bounds and limits of the proper jurisdiction of the Circuit Court; and the matter sufficiently appears on the face of the petition and proceedings as well as by the suggestion, which is neither answered nor denied.

That this court has original jurisdiction to issue the writ of prohibition can scarcely be questioned. The Supreme Court is invested by the Constitution with a general superintending control over all inferior courts of law in the State, and with original jurisdiction and power "to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and all other original remedial writs, and to hear and determine the same. (Const., Art. VI., § 3.) In respect of pre-eminence and power under the Constitution, it holds a position analogous to that of the court of King's Bench in England, which, says Blackstone, is a court of "very high and transcendent jurisdiction," and is "the Supreme Court of common law in the kingdom." Still more, this court is the final court of errors and appeals in the State. Like the court of King's Bench, it will "keep all inferior jurisdictions within the bounds of their authority, and may either remove their pro-

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ceedings to be determined here, or prohibit their progress below." (3 Black. Com. 41.) A prohibition is an original remedial writ, and it is old as the common law. It was the king's prerogative writ, provided by the common law as a remedy for "encroachment of jurisdiction." (3 Black. Com. 112.) It is, as it were, the counterpart of *mandamus*, which is in its nature affirmative, commanding certain things to be done; *prohibition* is negative in character, forbidding to be done certain things which ought not to be done: and though not expressly enumerated in the Constitution, it clearly comes within the words "*other original remedial writs*." It is directed to the judge and parties to a suit in any inferior court, and commands them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, or that, in handling matters clearly within their jurisdiction, they transgress the bounds prescribed by the law of the land. (3 Black. Com. 112.) Says Justice Coke, from the King's Bench: "We, here in this court, may prohibit any court whatever, if they transgress and exceed their jurisdiction. And there is not any court in Westminster Hall but may be by us here prohibited, if they do exceed their jurisdictions, and all this is clear and without any question." (Warner v. Sucterman, 3 Bulst. 119.) One great object of the writ is to prevent conflicts between different courts, and a determination of the law in different ways by different courts; "an impropriety," says Blackstone, "which no wise government can or ought to endure, and which is therefore a ground of prohibition." (3 Black. 113.) It is granted at the instance of any one of the parties to the suit below, plaintiff or defendant, and even by a stranger (2 Inst. 602; 6 Com. Dig. 105); and because they deal in that which does not appertain to the jurisdiction of the court. (2 Inst. 607.) Indeed, the authorities are endless, and place the subject beyond all dispute. (2 Sel. 308; 6 Com. Dig. 105, 140; 6 Bac. Abr. 579, 600; Full v. Hutchins, Cowp. 424; Buggin v. Bennett, 4 Burr. 2035.)

It might be supposed that the court below proceeded upon a construction of the Constitution, ordinances, or statutes of the State, different from that which is here put upon them, and that, having jurisdiction to construe them when brought before the court, any errors committed might be corrected by appeal or writ of error. Indeed, it would seem almost necessarily to be inferred that the court did so proceed, in fact, or that it ignored them altogether. Both defendants appear to have assumed, wilfully, or by mistake of the law, that the ordinance vacating civil offices was null and void; that they were at liberty to disregard it, and that the public officers appointed under it, as well as the Governor in enforcing it, were acting without legal authority; otherwise, this petition and affidavit would have to be considered as, for the most part, a tissue of wilful and deliberate falsehoods, and it would be scarcely conceivable that any sane man could have sworn to them, or that the court could have ventured to act upon them as true. In general, the authorities seem to show, that, in order to justify a prohibition on the sole ground of a misconstruction of statutes, the statute must be pleaded, or the facts stated in such manner as to bring the statute directly in question, and it must distinctly appear that the court below is proceeding upon such misconstruction. It is unnecessary for the decision of this case that we should determine this point here; but if it did sufficiently appear, a prohibition would go on that ground also. It belongs peculiarly to the Supreme Court to put a final construction upon the Constitution and the statute laws of the State, and indeed upon the common law also recognized in this State. In like manner, the superior courts of law in England assume the determination of the construction of the acts of Parliament; and they prohibit all inferior courts from proceeding upon any construction different from that which is put upon them by superior courts. If an inferior court misinterprets a statute, that is held to be a proceeding contrary to the statute; and when courts of peculiar jurisdiction, as the Ecclesiastical or Admiralty courts, which pro-

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ceed in general according to the civil law, bring in question the statutes or common law of the realm, they are required to interpret, construe, and expound them, as they are expounded by the superior courts of common law, or as those courts shall say they ought to be expounded, when brought before them in prohibition. (*Home v. Carnden*, 2 H. Bl. 583.) For the law is not to be interpreted and decided in two different ways under the same government. If this were to be allowed, or if there were no power in the Supreme Court to interfere by prohibition in the exercise of its original jurisdiction, and that superintending control, which is given by the Constitution, the inferior courts might be brought into unseemly conflicts with one another or with this court, and we might have to witness the disorderly and disgraceful spectacle of the officers of different courts, armed with contradictory process, meeting in direct collision in the public streets, and inaugurating riot and civil disturbance, while purporting to be acting in the name of one and the same executive authority. Certainly, such things can never be permitted in any well ordered government. It was held in *Gould v. Gapper*, (5 East. 345,) in an elaborate decision by Lord Ellenborough, that the court of King's Bench would prohibit the spiritual courts, or any inferior court, from proceeding upon a construction of an act of Parliament different from that which was put upon it by that court, notwithstanding there was a remedy by appeal or writ of error; not that the inferior court might not have jurisdiction to construe it, but "that the mischiefs of misconstruction were to be prevented by prohibition;" and there can be little doubt that this court has like power and jurisdiction in similar cases.

We have found no instance reported of the exercise of this jurisdiction in prohibition hitherto in this State; but it is not without precedent in several other States of the Union. In *Glover v. Simmons*, (4 McCord, 67,) the jurisdiction is recognized as at common law; and in *Grier v. Taylor*, (4 McCord, 206,) may be found an able exposition of the appli-

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cation; use and limitations of this writ under governments constituted like ours. It is rather to be considered as creditable to the ability and fidelity of the judges of the inferior courts of the State, that, for so long a period, no occasion has hitherto arisen which called for the interposition of this court by prohibition to keep them within the bounds of their lawful powers and jurisdictions; but in a case like this, without example in the history of the State, involving matters of the highest moment in the government, important for the honor and dignity of the judiciary, and essential to the peace and order of society, and in which the law is clear and the jurisdiction certain, we cannot hesitate to make the first precedent. Nothing can be of greater importance to the State and people, than that all courts should be kept in due line of order and authentic place in the administration of justice.

Rule made absolute. Judge Lovelace concurs. Judge Wagner not sitting.

NOTE.—The following opinion was given by Judge Moodey upon dismissing the case:

ST. LOUIS CIRCUIT COURT, September Term, 1865.

In the case of *Mead v. Thomas, &c.*—Injunction—*Ex parte* Wagner, &c., for contempt,—the following order will be entered:

The Supreme Court having issued its mandate prohibiting this court from proceeding any farther in either of said cases, it is ordered that the same be dismissed; that said Andrew W. Mead pay the costs of the suit first named, and that said Wagner, &c., go hence unpunished for their contempt of this court in disobeying its order of injunction in case of *Mead v. Thomas*.

Gentlemen of the Bar:—It is no new thing for a court, while obeying the order of a tribunal higher in authority, to give its own opinion as to the law. This was done by that model jurist Judge McLean in *Bronson v. Kinsey*, and it has been often done in your hearing by one of the ablest of my predecessors on this bench. I therefore, even in these lawless times, venture to do so.

On June 18, 1865, Andrew W. Mead presented his petition to the judge of this court, at the Law Library in front of the open door of the Supreme Court-room, stating that he was the clerk of the Supreme Court at St. Louis, and in possession of its records, papers, and seal; that James S. Thomas, David Wagner, Walter L. Lovelace, E. H. E. Jamieson, Ferdinand Meyer, Nathaniel Clark, Bernard Laibold, R. H. Bowman and John C. Vogel were about to take said records, papers and seal from him by force, and praying an injunction to restrain them from so doing. On this petition and an approved bond, an injunction was issued to restrain and prevent the act complained of.

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At that time, within my view, the Supreme Court of Missouri was in session in the Supreme Court-room; Judges Dryden and Bay were on the bench in the discharge of their duties of judges, at least under color of right. Of this fact I was bound to take judicial notice. It was not my province to determine the right of Judges Dryden and Bay so to do, no more than it was my right or duty to determine now the right of those who, in fact, occupy the same bench, until the question comes before me in some way known to the law. It was not my duty to search all the obscure corners of this immense building to see if any rival tribunal were sitting there. If such was the fact, I, for one, never knew it until three days ago.

In the case of Conrad v. Bernoudy, this court had decided that the tenure of office of those previously elected by the people was not affected by the Vacating Ordinance of the State Convention. That case was appealed to the Supreme Court for decision there. Its decision, then, under the peaceful forms of law, would have saved Missouri many years of strife and perhaps much bloodshed. I had then no judicial knowledge of the claims of any other person or persons to seats on the Supreme bench, except those of the old incumbents, Dryden and Bay. On July 17, 1865, an affidavit was presented to this court by the counsel of said Mead, stating that on June 14, 1865, a portion of the defendants in said injunction case, and others named in said affidavit—a portion of whom had been served with copies of the injunction, and the rest knowing of its existence—had, in violation of it, taken said records, &c., out of his custody by force.

The records of the Supreme Court show these facts, viz: On Monday, the 12th, and Tuesday, the 18th of June, 1865, the court sat at St. Louis: Judges Dryden and Bay on the bench, and Mead acting as clerk. On the 18th they adjourned to Wednesday, the 14th, at 10 o'clock. At that date, the affidavit of Mead and the history of the times show how the court was broken up, the judges arrested, and the records and seal taken by force from Mead, their only lawful custodian. Since then said record has been made to show that on June 12th another court sat somewhere, composed of Wagner and Lovelace; that A. R. Bowman was appointed clerk; that it adjourned to June 18th, on which day, "there being no business before the court," it again adjourned to June 14th. On that day it is made to appear that the court met, and then, for the first time after the lawless acts complained of in Mead's affidavit, the Judges Wagner and Lovelace produced their commissions. If they had kept their commissions securely in their pockets all the day, June 18th, on which the injunction was issued, I cannot see how this or any other court was bound to know judicially of their existence; and if I had known of it then, after the decision I had made in Conrad v. Bernoudy, which was appealed and still pending, I would not have recognized them while Dryden and Bay sat on the bench. On hearing Mead's affidavit, a summons was ordered to the parties named therein—to-wit: David Wagner, Walter L. Lovelace, Nathaniel Clark, Ferdinand Meyer, James S. Thomas, R. M. Field, Henry A. Clover, Samuel Knox, E. H. E. Jamieson, Thomas C. Fletcher, and David Coleman—to appear on September 25, 1865, and show cause why they and each of them should not be attached for contempt. This summons was, I believe served on all of them. At the time of issuing the summons the suit was dismissed as to John C. Vo-

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gel, by my suggestion, no charge being made against him in the affidavit. On September 23, 1865, the Supreme Court, composed of a new set of judges *de facto*, met at St. Louis, pursuant to the following call, viz :

"SUPREME COURT—SPECIAL TERM.—In vacation of the Supreme Court of Missouri, September 4, 1865.—Ordered that a Special Term of the Supreme Court of the State of Missouri be held at the Court-house in the city and county of St. Louis on Friday, the 22d day of September, 1865.

"And it is further ordered that a copy of this order be published in some newspaper printed and published in the city of St. Louis for at least ten days preceding said term.

NATH'L HOLMES, }
W. L. LOVELACE, } *Judges Supreme Court.*

"In pursuance of the above order, notice is hereby given that a Special Term of the Supreme Court of Missouri will be held at the Court-house in the city and county of St. Louis on Friday, the 22d day of September, 1865.

JOHN A. WILLIS, *Clerk.*

"NOTE.—The docket will not be taken up."

That part following the names of the judges was in the handwriting of Charles D. Drake.

On that day a petition *not sworn to* was presented by James S. Thomas, one of the defendants in the proceedings for contempt, signed by Henry A. Clover, R. M. Field and Samuel Knox, three of the other defendants, as attorneys, and addressed to the court, consisting of three judges, two of whom were also defendants, asking for what the learned counsel call "the people's writ of prohibition" against said Mead and myself by the *descriptio personæ* of judge of this court, to prevent any further proceedings in the injunction suit of Mead v. Thomas. A rule *nisi* was entered, and a copy served on me on the same day to appear on September 25, at 10 o'clock, and show cause why such writ should not be issued. Not understanding how a court composed of three judges, where the law required two to make a quorum, and where two of them were directly interested, could sit in judgment on the case, I thought it in vain to attempt to show cause, and did not do so, and the rule was made absolute, and a final order entered prohibiting any further proceedings in the case.

There is some confusion of terms in these proceedings. The rule *nisi* issues only in the case of Mead v. Thomas, &c. This does not necessarily touch the case *Ex parte Wagner, &c.* The writ of prohibition is not "the people's writ" except in New York. A petition not sworn to is not allowed by our statute.

The writ of prohibition issues to an inferior court, and the parties to the proceedings in that court. This one issues at the instance of one defendant, and three other defendants as his attorneys, on a petition addressed to two of the other defendants as part of the court. But I will overlook all mere irregularities.

I have shown that Mr. Mead was the clerk under Judges Dryden and Bay. The injunction was issued on June 18th, while they were on the bench acting as judges *de facto*, at least. The outrage, to prevent which the injunction was issued, was committed on June 14th, pursuant to the following order and instructions, both dated on June 14th :

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"HEADQUARTERS STATE OF MISSOURI, June 14, 1865.

"Special Order.]

"I. The usurping judges of the Supreme Court will be compelled to submit to the Ordinance of the State Convention vacating certain offices.

"II. David Wagner, Walter L. Lovelace and Nathaniel Holmes will be put in possession of the Supreme Court-room in the Court-house of St. Louis, with all the records, seals, furniture, books and papers of the office of the clerk of the Supreme Court.

"III. Brig. Gen. D. C. Coleman is charged with the execution of the order, and will employ such force for that purpose as he may deem necessary, and arrest all who may oppose him.

THOS. C. FLETCHER,
Gov. & Commander-in-Chief."

"HEADQUARTERS STATE OF MISSOURI, June 14, 1865.

"GENERAL:—Herewith please find Special Order directing you to enforce the 'Ordinance of the State Convention vacating certain offices,' by putting the recently-appointed Judges of the Supreme Court into the possession of the court-room, records, &c., of that court.

"You will proceed to the Court-house, and on the arrival of Messrs. Dryden and Bay deliver to each of them the sealed note addressed to each of them respectively. An officer of the city police will accompany you, and will have a force of city police at hand.

"If, after delivering the notes, the said Bay and Dryden do any act to disturb Messrs. Lovelace and Wagner in entering on said discharge of their duties as Judges, you will direct the policemen to arrest them and take them before the City Recorder, and at once inform me of that fact.

"In case Messrs. Bay and Dryden do not come to the Court-house at nine o'clock or soon thereafter, you will cause the note referred to, to be delivered to them at their rooms.

"In putting the Judges into possession of the court-room and clerk's office, you will, as far as convenient in your judgment, avoid the use of violent means; but if in your judgment necessary, do not hesitate to employ all the force it may require.

THOS. C. FLETCHER.

"To Gen. David C. Coleman."

I now proceed to state the law on the subject. In doing so, I assume that the Supreme Court intended this writ of prohibition to apply to the case *Ex parte Wagner, &c.*, as well as to that of *Mead v. Thomas, &c.* I do so because it cannot be doubted that this special session and this whole proceeding were got up to prevent this court from punishing Thomas and his three lawyers, and two of the judges of the Supreme Court and their lawless associates, for what is charged against them on the files of this court under oath, and which, if true, is a gross violation of the law. *The subject of contempt is the exclusive care of the court against which such contempt is committed, and no other court of any jurisdiction can interfere by writ of error, appeal, habeas corpus, certiorari, or prohibition, so long as the court in question is acting within its jurisdiction and by rules of practice known to the law.*

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QUO WARRANTO. (R. C. 1855, § 1, p. 1808.) "In case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, the Attorney General or circuit attorney of the proper circuit, with the leave of any Circuit Court, shall exhibit to such court an information in the nature of a *quo warranto*, at the relation of any person desiring to prosecute the same." (See remainder of the act.) It is the only law we ever had for trying the title to an office.

If this court had jurisdiction to try the title to Mr. Mead's office between him and any other claimant, surely it had jurisdiction to grant an injunction to prevent that question from being settled by a lawless mob. Since I have been on this bench, a number of cases of *quo warranto* have come before me: in but one of them was the question of jurisdiction raised; that was the case of *Jackson v. Emerson*, which came here by change of venue from the Iron county Circuit Court. A motion was made by Emerson's counsel to dismiss the writ for want of jurisdiction; I overruled the motion, and I will not soon forget the valuable aid I received from the long and able argument of my brother Nathaniel Holmes, Esq., who was the attorney of Jackson. He was not then a party interested. In that argument he convinced me that the Circuit Court of the proper county was the place to try the title of *any office*, and I ruled accordingly. Now, if any person claimed Mr. Mead's office, or that of either Dryden or Bay, his remedy was to apply to the court for a writ of *quo warranto*, and the matter could have been tried in five or six days and an appeal taken, if desired, by either party, under the ordinary peaceful forms of law. If this court had jurisdiction to try the title to Mr. Mead's office, surely it had power under the express statute on that subject to grant an injunction to restrain a lawless political mob from trying the same question by force of clubs. (This point I will not argue.) And if it had jurisdiction to issue an injunction, then the statute (R. C. 1855, p. 1250) gives the express power to enforce it by attachment, fine and imprisonment.

When the writ of prohibition was issued, then it follows from the above that this court had jurisdiction of both the cases named at the head of this paper. It is proper then to inquire, was this court proceeding against the parties defendant under the recognized rules of law? When the affidavit of Mead was filed on July 17, 1865, I might have ordered an attachment forthwith against all the parties named it. I now regret that I did not do so. But I then thought the milder course the proper one, and ordered a summons to the defendants Wagner, &c., to appear on the first day of this term to show cause why an attachment should not issue against each of them for contempt. This is the mildest form of proceeding known to the law against parties charged with contempt. I had prepared written interrogatories to place on file for these parties to answer in writing, under oath, privately, without the unpleasantness of an oral examination in open court, when the rule *nisi* aforesaid was interposed. I therefore declare that this court *had jurisdiction* of the case of *Mead v. Thomas*, and the case of *Ex parte Wagner, Lovelace, &c.*, for contempt, and was proceeding according to the mildest rules of law to discharge its duty when this rule *nisi* and the writ of prohibition unlawfully interfered.

Bouvier's Law Dictionary defines contempt to be "a wilful disregard or disobedience of a public authority," and adds "courts of justice have an in-

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herent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing their proceedings." And again, quoting from Kent, he says, "it belongs exclusively to the court offended to judge of contempts and what amounts to them, and no other court or judge can or ought to undertake, in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction." This may be considered the established doctrine equally in England as in this country. "The right to issue a *capias* for a contempt is incident to the jurisdiction of the Court of Common Pleas." (*Marimer v. Dyer*, 2 Me. 165.) "The power to commit for contempt of court is incidental to all courts of record." (*Morrison v. McDonald*, 21 Me. 550.) "Every court *must* be the sole judge whether or not a contempt has been committed against it." (4 Cowen, 49.) "The adjudication of a court of competent jurisdiction respecting contempts is not subject to the review of any other court." (1 Blackf. 166.) "In a case of contempt, no appeal or writ of error will lie. Each court is its own exclusive judge of what is a contempt." (5 Yerg. 456, opin. by Catron.) "In case of commitment by this court or the King's Bench, there is no appeal."—C. J. De Grey, in the Mayor of London's case. (3 Wilson, 188.) In the same case, Blackstone, J., said: "The sole adjudication of contempt, and the punishment thereof in any manner, belongs exclusively and without any interference to each respective court. The judgment and commitment of each respective court, as to contempt, must be final and without control." See, also, *The People v. Nevins*, 1 Hill, 154; also *Ex parte Yeates*, 4 Johns. 814, in which Mr. Justice Kent so highly approves of the opinion of De Grey and Blackstone, in the Mayor of London's case above quoted. "In fine, it seems necessary to the very existence of a court, in the healthy exercise of its powers, that it should have exclusive jurisdiction to judge of contempt to its authority." (1 Bibb, 508; 5 Iredell, 199.) As to the liability of persons not parties to the injunction, or not served with a copy, but who *knew* of its having been issued, see *Charleton*, p. 43.

In case of contempt, the Supreme Court may revise the action of an inferior court as to the question of jurisdiction only; as to the fact of a contempt having been committed, and a conviction therefor, there is no appeal. (*Case of Hummel & Bishoff*, 9 Watt, 481.) In *Ex parte Kearny*, 7 Wheat. (U. S. Sup. Ct.), it was held that "the court would not grant a *habeas corpus* where a party had been committed for a contempt, adjudged by a court of competent jurisdiction. In such a case, the court would not inquire into the sufficiency of the cause of commitment."

Sec. 40, p. 589, R. C. 1855, provides as follows: "No judge of the Supreme Court who is interested in any suit, or related to either party, or who shall have been counsel in any suit or proceedings, which now is or may be instituted, shall sit on the determination thereof." Sec. 20, p. 1284 of same: "The petition, answer and reply must each be verified by the affidavit of the party," &c.

Quoting a phrase or two from the Supreme Court, I have "the unparalleled effrontery" to say that "the highest functionaries of the State Government, executive and judicial, are just as amenable to the law and liable to its penalties as "merely private and unofficial persons."

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If any court has the power to issue the writ of prohibition, it should never exercise it except in a very clear case peremptorily calling for an immediate remedy. (2 Iredell, 188.) A writ of prohibition will not lie where the inferior court has jurisdiction. (9 S. & M. 623; 5 Pike, 21; 16 Eng. L. & Eq. 462; 7 Wend. 518; 4 Rich, p. 518; 23 Ala. 94.) At common law, no writ of prohibition can issue until it appears that the question of jurisdiction has been raised and decided in the lower court, (7 English, p. 70.)

To this brief statement of the cases, and the law above cited, I add no comments. I therefore dismiss it.



STATE OF MISSOURI, Plaintiff, v. ALEXANDER J. P. GARES-
CHÉ, Defendant.

Constitution—Attorneys.—The provisions of the new Constitution, Art. II., §§ 6, 9 & 8, which prohibit attorneys and counsellors-at-law from practising in the courts of this State until they have taken and filed the "oath of loyalty," so called, are not in conflict with the Constitution of the United States; they do not impair the obligations of a contract, nor are they in the nature of an *ex post facto* law, nor an attainder.

At the calling of the State *ex rel.* Conrad v. Bernoudy, appealed from the St. Louis Circuit Court, Mr. Garesché, as counsel for respondent, appeared prepared to argue the case. Upon inquiry from the court, whether he had complied with the rule adopted by the court and taken the oath of loyalty prescribed by the new Constitution, he replied that he had not. The court then refused to permit him to argue the cause. Mr. Garesché then filed his written motion for leave to appear in the cause as counsel for respondent, upon a retainer for his services, until the final decision of the case; as also upon his right so to do, as being already an attorney and counsellor in the Supreme Court.

(*Motion to vacate order and judgment.*)

And now comes said Garesché *in propria persona*, and moves the court to vacate the order and judgment so made distraining him as a practitioner; because it impairs the contract existing between him and his clients; because the order of the court is illegal, unjust, and oppressive; because the oath is one prohibited by the Federal Constitution; and therefore this court should not enforce it, and its rule

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made at opinion of court and its judgment against said Garesché is therefore illegal ; because the order that said oath must be taken is otherwise illegal and unconstitutional, and in violation of the Constitution of the United States.

(Signed,) ALEXANDER J. P. GARESCHÉ.

HOLMES, Judge, delivered the opinion of the court.

Alexander J. P. Garesché, *in propria persona*, files his motion to vacate the order of the court debarring him as a practitioner. It is not very clear on what precise grounds of law this motion is based. We gather, however, that the mover contends that he has some right to practise as an attorney and counsellor-at-law in this court, which is protected by the Constitution of the United States from the operation of the Constitution of this State. He asks that the rule of court (which prohibits attorneys and counsellors from practising in this court without having taken the oath of loyalty as required by the Constitution of this State), and also the decision or order made in pursuance thereof, refusing him permission to appear and be heard as counsel for the defendant in the case of the State v. Bernoudy, should be vacated, for the reason that they are prohibited by the Federal Constitution as impairing the obligation of contracts. It appears to be claimed, also, that the requirement of this oath is unconstitutional, as being an *ex post facto* law.

Our attention is not called to any other specific clause in the Constitution of the United States, which is supposed to be violated. Nor does it very distinctly appear, in reference to the clause concerning the obligation of contracts, whether the party here rests his objection upon his license to practise generally, or upon his particular engagement as counsel in the case named, or upon both ; but we are of opinion that neither the one nor the other is a contract within the meaning of the clause in question.

Originally, no person could appear in court by attorney ; but under certain ancient statutes attorneys were admitted to practise by the courts, and were in all points officers of the courts, having many privileges. They had to be examined

by the judges for admission, and none were admitted but "such as were virtuous, learned, and sworn to do their duty." Counsellors (barristers or sergeants) were admitted as such only upon sixteen years' standing; were also bound by a solemn oath to do their duty, and were of that honorable state and degree that they practised for honor merely; could maintain no action for fees, and accepted them, not as a salary or hire, but as an honorary gratuity; and if guilty of deceit, collusion, or any misdemeanor in practice, they were liable to be stricken from the rolls, "and punished by imprisonment and perpetual silence in the courts." (3 Black. Com. 25; 1 Bac. Abr. 423.)

In nearly all the States of the Union, the subject of attorneys and counsellors is regulated by statutes, which require in general an examination for admission, a good moral character, and a solemn oath to support the Constitution and laws of the country, and faithfully to perform their duties—(1 Dane's Abr. 294); and under the statutes of this State, no person can practise law as an attorney and counsellor, in any court of record, without a license from a court or judge; nor be licensed without producing satisfactory testimonials of good moral character, undergoing a strict examination as to his qualifications, and taking an oath to support the Constitution of the United States and of this State, and faithfully to demean himself in practice to the best of his knowledge and ability. (R. C. 1855, p. 278.)

The new Constitution now requires of all attorneys and counsellors (as well those already admitted as those hereafter to be admitted), that they shall take an additional oath of loyalty before being permitted to practise in the future. We are unable to discover where in this oath, required of the party here, anything more than he was legally and morally bound to have done by the obligation of the oath which he took when admitted to practice. The acts referred to in the oath, as specified in the 3d section (Art. II.), are such only as, if done, might amount to treason, or to evidence (more or less direct and conclusive) either of treason, or of

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disloyalty and disaffection to the Government. Can it be too much to say, that this party, by virtue of the oath he had taken, was under legal and moral obligations not to be guilty of either? It is true, any person who has been guilty of treason may be tried in due course of law as for the criminal offence; and any attorney may be prosecuted and disbarred, under the act regulating Attorneys, for any of the offences therein mentioned. The provisions of the Constitution concerning the oath of loyalty do not in any way modify these offences, nor change the punishment or the evidence required. Bills of attainder assume judicial magistracy and declare persons to be guilty of high crimes, punishable with death, attainder of inheritable blood, or confiscation of property, without judicial trial; or (as bills of pains and penalties), in like manner, declare them guilty of lesser offences, and inflict some milder degree of punishment—(2 Sto. Const. § 1344; 2 Woods, § 371-87; *Calder v. Bull*, 3 Dalt. 386; *Gaines v. Buford*, 1 Dana, 509); and *ex post facto* laws relate to laws of a criminal nature only. The prohibitions of the Constitution of the United States extend to bills of attainder and to every law whereby an act is declared a crime, and made punishable as such, when it was not a crime when done; or whereby the act, if a crime, is aggravated in enormity or punishment, or whereby different or less evidence is required to convict an offender than was required when the act was committed. (Sto. Const., Abr., § 679.) The party here is not declared guilty, nor made punishable, without trial, for any crime or offence whatever; nor even subjected to trial for any past offence of a criminal nature; much less to any aggravated punishment, or to any rules of evidence different from those which before existed.

Nor does the Constitution make any act criminal which was innocent when done. We do not see that, in any just and proper legal sense, the requirement of this oath can be said to be a bill of attainder or an *ex post facto* law. (Smith's Comm. § 230-31.) Nor can it be said to be a retrospective

law, as being retroactive in its operation; for it neither takes away nor impairs any civilly vested rights, nor creates any new obligation, duty, or disability, in respect of any past contract, vested right, or other civil transaction. (1 Kent's Com. 451 & 501; Smith's Com. § 149 *a.*, § 156.) The upshot, scope and effect of it would seem to be clearly this only, that a new oath of loyalty shall now be taken by all attorneys and counsellors as further and additional evidence or testimonial of good moral character, and of that fidelity to the Constitution and laws, which public policy, the public safety and the public good always have demanded of these sworn officers of the courts as trusted ministers in the temples of Justice; and that all those who cannot, or will not, give this evidence of trustworthiness in an honorable profession which derives its peculiar powers and privileges from the laws of the State, must be content for the present to be silent in the courts. All questions respecting the wisdom, policy, expediency, or natural justice, of the measure, belong exclusively to the law-giving body, or to their constituencies, the people, and not to the judiciary, which concerns itself only with the constitutional and legal validity of the law when made, and with the proper interpretation, construction and application of it. (1 Kent's Com. 494; Bennett v. Boggs, 1 Baldw. 74; Providence Bk. v. Billing, 4 Pet. 563; Cochran v. Van Surly, 20 Wend. 381; Smith's Com. § 134.)

Attorneys and counsellors are not only officers of the courts, but in some sense public officers, though not strictly State officers.

Matters of internal government, and public offices held within a State and for State purposes, or as a part of the civil institutions of the State, with or without salary or fees from the State, are subject to ordinary legislation as the public judgment and good government may demand, and they are not embraced in the word "contract" within the meaning of the Federal Constitution.—Dartmouth Coll. v. Woodward, 4 Wheat. 627 (Marshall, C. J.), 693 (Story, J.); Butler v.

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Pennsylvania, 10 How. (U. S.) 402; Conner v. City of New York, 1 Seld. 285; Benford v. Gibson, 15 Ala. 521; Sto. Const. (Abr.) § 707, 708; Smith's Comm. § 262.

In the case of *Simmons v. State* (12 Mo. 268), it was held that a license to practise law was a mere naked grant of a privilege, and neither a franchise (in the sense of property) nor a contract; and in the "*Matter of Oaths by Attorneys*," 20 J. R. 492 (in which attorneys were required to take an oath, under the statutes of New York, that they had never been engaged in a duel), it was said to be a bare franchise or liberty; and in *Austin v. State* (10 Mo. 591), this court (Napton, J.) went so far as to declare, that the State has the power to abolish or restrict any trade or profession as they may think expedient, or to require any qualifications of age, length of residence, moral character, &c., which in their wisdom they may think proper; and that when the Legislature does not prohibit the calling or profession altogether, but "allows it to be exercised by certain persons, it then becomes a municipal privilege, which may be only exercised by those persons who have the qualifications and pursue the steps required by law." These expressions were used in a case where an act of the Legislature, restricting the exercise of the party's calling, was called in question as being repugnant to that clause in the Federal Constitution which declares that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States; but we think they have equal force here upon the questions of the general right of the party to pursue the practice of his profession by virtue of his former license.

As touching the matter of his particular engagement, it does not appear that he had any other contract than a general employment as counsel in a certain controversy in all the phases which it might assume in the courts, for as much as his services might be worth. On this it may be sufficient to add, that if the State has seen fit, in the exercise of its legislative control over the public offices and municipal in-

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stitutions of the State, or over the trades and callings carried on within the State, to require qualifications for the practice of the legal profession which he no longer possesses, or requisitions with which he is unwilling to comply, that is rather to be considered as his own fault or misfortune than as the consequence of any unconstitutionality in the law. He may be entitled to compensation for the service actually rendered; and if he has been paid in advance for services which he cannot render, the case of *Benton v. Craig* (2 Mo. 198) would seem to be good authority to the point, that the other party could recover back the amount in an action for money had and received. We do not see that there is any contract here which comes within the protection of the Constitution of the United States.

Motion overruled. Judge Lovelace concurs; Judge Wagner not sitting.

[END OF SPECIAL SEPTEMBER TERM.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
OCTOBER TERM, 1865, AT ST. LOUIS.

THE STATE OF MISSOURI, Respondent, v. J. A. CUMMINGS,
Appellant.

1. *Constitution—State—Church.*—The State has the power to regulate, control or prohibit any trade, business, or profession, within the limits of its jurisdiction. The provisions of the new Constitution, Art. II., §§ 6, 9, 14 & 8, do not conflict with the provisions of the Constitution of the United States. Such provisions are not in the nature of an *ex post facto* law, nor of a bill of attainder. A bill of pains and penalties is a law in the nature of a judicial act declaring a person's estate confiscated, or forfeiting some right, without giving him the right to be heard before a judicial tribunal, and by its own force inflicts the penalty. The provisions of Art. II. merely prescribe certain prerequisites for the doing of certain acts, and inflicts a penalty only for failing to comply with the conditions prescribed.
2. *Constitution—Ex post facto Law.*—The provisions of Art. II., §§ 6, 9, 14 & 8, are not in the nature of an *ex post facto* law, for they do not impose any penalty for any act previously done; but punish the doing of some future act unless certain terms are complied with, which is violating an existing law.
3. *Constitution—Declaration of Rights.*—The provisions of Art. II., §§ 8, 6, 9 & 14, of the new Constitution do not conflict with the provisions of Art. I.

Appeal from Pike Circuit Court.

Whittlesey with R. A. Campbell, for appellant.

I. Requiring this oath of a clergyman before he can be allowed to preach, is inconsistent with the principles of gov-

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ernment as declared by the Declaration of Rights in the first article of the Constitution. The provisions of the second article conflict with those of the first, and especially with sections 1, 2, 3, 9, 18, and 27.

What is the Declaration of Rights? It is a declaration of the principles upon which the government is founded, the objects it is intended to secure, and of those fundamental rights which belong to the citizen as a man, and not as a member of a political society. It is a limitation upon the powers granted by the Constitution.

It is, therefore, by the principles contained in the Declaration of Rights that the Constitution and all statutes enacted by its authority are to be construed. The Declaration of Rights is the superior law of the Constitution. It is so stated in the preamble to the Declaration of this New Constitution: "That the general, great and essential principles of liberty and free government may be recognized and established," "we do declare," &c.

1. "That we hold it to be self-evident, that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." What is meant by inalienable rights, if it be not that these rights belong to the citizen as a man because he is a man, and not as a member of civil society, a component portion of the State.

2. The provisions of Art. II. (so far as it affects the defendant) conflict with the 3d sec. of Art. I., as it makes him liable to a punishment to which others who have done the same acts are not exposed.

3. These provisions of Art. II. destroy the freedom of worship, and attack the freedom of conscience.

In the 9th section of the Declaration, it is announced as one of the great and essential principles of liberty, "that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences;" "that no human authority can control or interfere with the rights of conscience."

Freedom of worship implies more than the simple act of private prayer to God, or even of public prayer in the congregation. That there be freedom of worship, it is requisite, not only that the congregation have the liberty of assembling in their churches, but that they also have the right of receiving instruction in their duties to God by the preaching of the minister set over them by their church. If they may only listen to the preaching of him who has a license from the State, they are not free to worship according to the dictates of their own consciences, but they are directed by the consciences of those who happened to have the majority of votes, and who therefore controlled the administration by adopting the Constitution.

4. Preference is given by law to one church over another, contrary to section 9, Art. I.—to the loyal over the disloyal church, so called. The church may not have a preacher of their own selection, unless it be one who can take the “oath of loyalty,” so called; and thus the law gives a preference to the loyal church, so called.

5. The preacher accused is compelled to give evidence against himself, and is deprived of his liberty of preaching without trial. In form, he is at liberty to prove his innocence by taking the oath. If he take the oath falsely, he is punished for perjury; if he do not take the oath, he is punished by deprivation of his right to preach, of his office in the church as a preacher.

6. The provisions of Art. II. destroy the freedom of speech. If the preacher has ever, by words uttered, manifested his adherence to the enemies of the United States, or his sympathy with those engaged in the rebellion, then he cannot take the oath, and without taking it he is forbidden to preach; and thus he is punished for his words spoken. What freedom of speech is there when a man can be deprived of his rights for words spoken—words not spoken falsely of his neighbor, but expressive merely of his opinions upon the questions of the day or the hour?

II. Article II., by its provisions, (so far as it applies to the

defendant) is in violation of the Constitution of the United States, it being an *ex post facto* law, punishing an offence previously committed by a penalty not prescribed at the time of the commission of the act, by increasing the penalty for the offence, and by making an act criminal which was innocent when it was done. (*Calder v. Bull*, 3 Dall. 186; *Fletcher v. Peck*, 6 Cranch, 87.) "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed."

The provisions of the second article, sections 2, 6, 9 and 14, of the New Constitution, so far as they apply to preachers, priests, bishops, elders, and other religious teachers living in this State at the time of the adoption of this Constitution, come within the intent of this prohibition.

What is a penalty or punishment? It is the depriving a man of a right enjoyed, or the inflicting upon him a pain, by authority of law, in consequence of some act done by him. 1 Black. Com. 7, defines punishment "as the evils or inconveniences consequent upon crimes and misdemeanors; being devised, denounced and inflicted by human laws in consequence of misbehavior in those, to regulate whose conduct such laws were respectively made."

Let us examine the provisions of Art. II., secs. 2, 6, 9 & 14, and see what they are. By sec. 6, no person may act as bishop, priest, deacon, &c., or teach or preach, unless he take the oath that he has not done any of the acts specified in sec. 2d of said article. What are the acts specified? We may classify them as follows: 1. That he has not committed treason against the United States—a crime punishable by the Constitution and laws of the United States. 2. That he has not committed treason against the State of Missouri—a crime punishable by the laws of this State prior to the adoption of the New Constitution. 2. That he has not, by word, manifested his desire for the triumph of the enemies of the United States or of this State, or his sympathy with those engaged in the rebellion—words, the utterance of which was not criminal either by the laws of the United States or of this State. 4. That he

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has not gone from one State to another to avoid the draft into the military service of the United States—an act which Congress might have declared criminal, but did not. 5. That he has not caused himself to be enrolled as a Southern sympathiser, or in sympathy with those engaged in the rebellion, to avoid enrolment or service in the militia of this State. 6. That he has not claimed his privilege as an alien, to secure exemption from service in the army of the United States, or in the militia of this State, after having voted or held office in any State or Territory—acts which were not criminal by any law whatever; for, by the laws of some of the States and Territories, any white male of lawful age can vote after six months' residence.

Now, if the preacher has done any of these acts, he is deprived of the right previously his, and this right is taken away from him as a consequence of his having done the acts; that is, to the penalties previously denounced by law against such acts is added the additional punishment of being debarred from pursuing his calling as a preacher.

This act, then, is punished in a manner in which it was not punishable when committed. Some acts are treated as criminal, and the preacher is to be punished for them, when the acts were not declared criminal by any law in existence at the time the act was done. He is punished, without fair trial by a jury of his peers, without accusation and opportunity for defence given by being confronted with the witnesses.

Sec. 2, Art. II., adds to the penalty of treason as prescribed by the U. S. Constitution, the additional penalty of the right to practise law, the right to teach even in private, and the right to preach as an officer of any church organization. It takes the form only of requiring a license, but under this form is the penalty of crime. (Dorsey's Case, 7 Port. Ala. 295; Opinion of Trigg, U. S. Dist. Ct. Tenn., Newspaper report.)

2. The provisions of Art. II. have the effect of a bill of attainder, which the States are prohibited from enacting by the Constitution of the United States. It is in fact a bill of pains

and penalties, declaring a general forfeiture of the right to preach and teach as bishop, priest or deacon, &c.

By using the general term "bill of attainder" in the Constitution, it was intended to cover also the cases of bills of pains and penalties. (Sto. Com. Const. § 1344 & 1373. (See opinion of Iredell, Jr., in *Calder v. Bull*, 3 Dall. 386.)

In the case at bar, the defendant, if he have done any of the acts specified in sec. 3, Art. II., forfeits the right, previously his, of preaching, and can be restored to that right only by taking an oath of innocence. Every priest or minister is charged with crime, but may take an oath of purgation; if he do not take the oath, forfeiture follows, and that is a punishment—a penalty—a pain. Such was the object of the provision, such is its effect.

III. These provisions of Art. II., §§ 3, 6, 9 & 14, of the New Constitution usurp the powers of the Federal Government by undertaking to punish offences against the United States.

The sovereignties of the United States and of this State are distinct and exclusive. The legislative jurisdiction over offences against the United States is exclusively in Congress. A State cannot assume jurisdiction of offences against the United States; it cannot give such jurisdiction to its courts, nor can Congress give it: that jurisdiction is exclusively in the courts of the United States. (*The People v. Lynch*, 11 Johns. 549.)

One country will not enforce the penal laws of another country, and so the State courts will not enforce the penalties prescribed by acts of Congress even in favor of individuals. It was so decided in the following cases: *Scoville v. Canfield*, 14 Johns. R. 339; *U. States v. Campbell*, 6 Hall's Am. L. J. 113; *Commonwealth v. Feely*, 1 Va. Cas. 321; *Ely v. Peck*, 7 Conn. R. 239; *Davison v. Champlin*, 7 Conn. 244; *Heney v. Sharp*, 1 Dana, Ky. 442; *Mattison v. State*, 3 Mo. 421.

In *Martin v. Hunter's lessee*, 1 Wheat. 304, it was held by the Supreme Court, "that no part of the criminal jurisdic-

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tion of the United States could, consistently with the Constitution, be delegated to State tribunals." (See also *Houston v. Moore*, 5 Wheat. 1, and *Fox v. State of Ohio*, 5 How. 510.)

Congress has declared what is treason—what shall be its penalties; it has also provided for punishing conspiracies, and for suppressing insurrection and rebellion. (Acts July 17, 1862, 12 Stat. L. & B.'s Ed., p. 589; Acts Aug. 6, 1861, 12 Stat., p. 319; Acts July 13, 1861, 12 Stat., p. 257.)

Now if Congress cannot confer criminal jurisdiction, over offences committed against the United States, upon the courts of the States, *a fortiori*, the States themselves cannot give that jurisdiction; still less can they assume the power of legislating for such offences.

Offences against the laws of the United States the President may pardon; he may remit the penalties prescribed; but here is a penalty he cannot remit, an offence he cannot pardon.

IV. When Congress has legislated upon a subject within its powers, its legislation is exclusive; the States cannot interfere with it, nor legislate upon the same subject matter. (See *Sturgess v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. R. 113; *United States v. Fisher*, 2 Cranch, 358; 1 Kent Com. 409; *Slocum v. Mayberry*, 2 Wheat. 1; *McNutt v. Bland*, 2 How. 17; *Fox v. State of Ohio*, *McLean's* opinion, 5 How. 510; *United States v. Coombs*, 12 Pet. 72.)

Congress has legislated upon the subject of treason, and enacted laws to punish conspiracies and rebellion against the United States; the State of Missouri, therefore, cannot legislate upon the same subject matter; it cannot legislate either by Convention or by General Assembly.

E. P. Johnson, for respondent.

The law under which the indictment was framed is valid. The Constitution of the State is not in conflict with the Constitution of the United States. The Constitution of the

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United States does not restrain the States from legislating in respect to an establishment of religion, or prohibiting the free exercise thereof.

The first article of the Amendments to the Constitution of the United States, like all other prohibitions contained in that instrument, when not otherwise expressed, is not a limitation of State power, but of the United States only. (Art. 10, Amend. to Const. of U. S. ; Barron v. Mayor, &c., of Baltimore ; 7 Pet. 243 ; 8 How. 609.)

The Constitution of the State is not *ex post facto* in its operation. The term *ex post facto* has a technical meaning, and is confined to criminal cases, to legislative enactments ; make an act punishable as a crime or offence which was not so when committed, or which enhances the punishment or penalty of an offence after it is committed. (Calder v. Bull, 3 Dal. 386 ; 8 Pet. 110.)

The Constitution of the State does not provide a punishment for past offences, but for violation of an existing law. The States have power to pass retrospective laws, provided they are not *ex post facto*, and do not impair the obligation of contracts. (Philadelphia & Wil. R.R. Co. v. Maryland, 10 How. 401, and authorities there cited.) There is nothing in the Constitution of the United States to prohibit the States from restricting or prohibiting the exercise of any trade or profession, or from prescribing the qualifications of persons who exercise such trade, and the State may do so if the law-making power should deem it expedient. (Austin v. The State, 10 Mo. 591.)

Freedom of conscience, in its legal acceptation, signifies that no person can be compelled to profess any form of religious belief, or to practise any peculiar mode of worship, in preference to another. It is simply a right to worship the Supreme Being according to the dictates of the heart ; to adopt any creed or hold any opinion whatever, or to support any religion, and to do, or forbear to do, any act for conscience' sake, the doing or forbearing of which is not prejudicial to the public weal. (Spect v. Commonwealth, 8

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Barr. 322, and cases there cited.) The Constitution of the State does not violate the above definition in any sense. There is no moral standard by which a court can adjudge a law void. The law-making power is governed only by the Constitution, and when laws are not in conflict with it, they must be respected. (1 Kent, 448; 3 Dal. 398; by Iredell, J., 1 Sneed, 687, Tenn.; Bish. Crim. Law, § 428, 3d ed.)

A bill of attainder is an act of the Legislature, by which one or more persons are declared to be attainted and their property confiscated. (Bouvier's Law Dict., Tit. Bill of Attainder; Sto. on Const., 1844.) The Constitution of the State has no such operation.

WAGNER, Judge, delivered the opinion of the court.

The appellant stands convicted under sections three, six, nine and fourteen of the second article of the Constitution of this State. The ninth section, *inter alia*, declares that no person shall "be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages," unless such person shall have first "taken, subscribed and filed" the oath specified in section six.

It is contended that that part of the Constitution requiring the persons above enumerated to take, subscribe, and file said oath before they are permitted to pursue their avocations or callings, is in contravention of Article I., sec. 10, of the Constitution of the United States, which prohibits the States from passing "any bill of attainder, *ex post facto* law, or laws impairing the obligation of contracts," and is, therefore, inoperative and void.

Bills of attainder are said to be such acts of the Legislature as inflict capital punishment upon persons supposed to be guilty of high crimes and offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If they inflict a milder punishment than death, they are called bills of pains and penalties. Bills of attainder may include bills of pains and penalties, and they

may affect the life of an individual, or confiscate his property, or both. (2 Sto. on Const. § 1844.) An *ex post facto* law "is when an action is declared to be a crime, which at the time it was done was innocent, or when it aggravates a crime, and declares it to be greater than it was when committed; or when it increases the punishment, or directs that different or less evidence shall be sufficient to convict the offender." (Raw. on Const., 115; *Shepherd v. The People*, 25 N. Y. 406.) Bills of attainder are justly considered odious; they are repugnant and abhorrent to all our ideas of justice, and ought never to be tolerated or countenanced. The history of England is full of the most startling examples, where the Parliament has claimed and exercised this transcendent power; and the same power was freely resorted to and exercised by the States at the close of the Revolution, and prior to the adoption of the Federal Constitution. The founders of our government saw the dangers to which the citizen would be exposed in times of high partisan excitement, prejudice and passion, and hence wisely provided for his security against oppression and wrong, by checks and guarantees. The subject was deemed of such great and paramount importance, that not only a direct inhibition was placed on the power of Congress to pass such laws, but it was also extended to the States. Not only justice, but the very genius of our institutions requires, that no man shall be convicted of a criminal offence, or deprived of his property, without the judgment of his peers, or the law of the land. The passing of such laws is not an exercise of legislative function, as they are in the nature of judgments.

When, therefore, it is apparent that laws are clothed with these characteristics, and are in conflict with the supreme law of the land—the Federal Constitution—courts will unhesitatingly declare them invalid and of no effect.

The question, then is: Is the provision in the State Constitution referred to, justly obnoxious to these objections? It does not come within the legal meaning and sense of a bill of attainder; for, as we have seen above, that is an act

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inflicting capital punishment. If, then, it is an infraction of the Constitution of the United States in this respect, it must be in the milder form of pains and penalties. To be a bill of pains and penalties, it is necessary that it should judicially declare a person's estate confiscated, or create a forfeiture of some right, without giving him the opportunity of being heard in the judicial tribunals of the country. It must be a bill, or law, which by its own force and operation inflicts the wrong complained of.

The clause in the Constitution here in controversy, confiscates no estates, declares no forfeitures, nor does it inflict any pains and penalties. In fact, it passes judicially on nothing. It imposes certain prescribed acts, as prerequisites to doing certain things, and for failure to comply with these acts, or violating the law as it exists, the party is held amenable. It does not, therefore, come within the meaning, scope or reasoning of a bill of attainder, nor of pains and penalties.

But it is said that the law is *ex post facto* in its operations. We will briefly examine and see whether it has any of the attributes properly belonging to laws of this description. The term *ex post facto* has application to civil laws of a criminal nature. (2 Sto. on Const., § 1345; Watson v. Mercer, 8 Pet. 110; Calder v. Bull, 8 Dal. 386; Carpenter v. Commonwealth, 17 How. 456.) It seems clear that the oath prescribed in the Constitution was adopted, not with a view to punishment for any past offence, but for future protection. The preventive provision, embodied in the fourteenth section, is not retroactive, but wholly prospective. It is not easy to perceive how, or in what manner, it attempts to subject to criminal punishment any person guilty of any of the offences mentioned in the third section. It is true certain qualifications are affixed as conditions on which certain designated classes shall engage in some kind of professions and callings. It is declared that no person shall be permitted "to teach, preach," &c., without first having taken an oath; and that any one who shall persist in exercising

such profession or calling after a prescribed time, shall incur the penalties therein expressed.

Clearly, he who refuses to take the oath, and still continues to pursue a calling, where the taking thereof is a prerequisite, or *sine qua non* to render it lawful, violates an existing law. He is not held liable for any acts supposed to have been done or committed antecedently, but for violating an actual subsisting law after its enactment. The distinction between what is legally meant by punishment, and the disability which may incidentally attach, is clear and obvious. It will not be seriously denied, that the State has the right to impose restrictions and conditions on her citizens in the exercise of their callings or professions, as a municipal regulation, provided it is deemed necessary to the public good, and does not deprive them of any natural right; and whether the exigencies of the times demand such enactments, the law-making power is the proper and appropriate judge.

But it is contended that the provisions requiring clergymen to take, subscribe and file an oath, is inconsistent with the fundamental principles of free government, as declared by sections 1, 3, 9, 11, 18, and 27, of the bill of rights. So much of the above sections as apply to the case here, are—

“SECTION 1. That we hold it to be self-evident that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

“SEC. 3. That no person can, on account of color, &c., * * * be restricted in the exercise of religious worship, or be hindered in acquiring education; or be subjected in law to any other restraints or disqualifications in regard to any personal rights, than such as are laid upon others under like circumstances.

“SEC. 9. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. That no person can, on account of his religious opinions, be rendered ineligible to any office of

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trust or profit under this State, nor be disqualified from testifying, or from serving as a juror; that no human authority can control or interfere with the rights of conscience, and that no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession; but the liberty of conscience hereby secured shall not be construed as to excuse acts of licentiousness, nor to justify acts inconsistent with the good order, peace, or safety of the State, or with the rights of others.

"SEC. 11. That in all criminal prosecutions, the accused has the right to be heard by himself and his counsel, &c.

"SEC. 27. That the free communication of thoughts and opinions is one of the invaluable rights of man; and that every person may freely speak, write, and print, on any subject, being responsible for the abuse of that liberty."

An analysis of these sections will not justify the conclusions arrived at by appellant's counsel. We do not see that any one is forbidden to enjoy the fruits of his labor, but in doing so he must conform to the law; the State asserts her superior control over all her citizens. The third section is not authority for the doctrine contended for; by its plain import, it was simply intended to place persons of color on an equal footing with all others in regard to their religious rights—nothing more and nothing else. Nor can it be said that, by section nine, freedom of worship is destroyed. The conscience is left perfectly free in the enjoyment of its natural rights of independent, religious action. Whilst there may be a restraint to officiating as a clergyman upon a failure to comply with the law, there is no clog or fetter on the freedom of the mind or conscience. There is no intermeddling with the natural and indefeasible right to worship God according to the dictates of the conscience; none are compelled to erect or support any place of worship, nor to attend any particular church against their consent.

The Legislature of Pennsylvania passed a law prohibiting any person to "do or perform any worldly employment or business whatever on the Lord's day, commonly called Sun-

day, works of necessity or charity only excepted." There are a large class of Christians who conscientiously observe the seventh day of the week as the rightful Sabbath, and regard the first day as a day of labor, and who contended that the law was an infraction of the Constitution as interfering with the rights of conscience. As the clause in the Pennsylvania Constitution is almost identical with ours, we will transcribe it. The section runs thus:

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent. No human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishment or modes of worship."

Yet the Supreme Court of that State, on several occasions, have held the law to be constitutional, and no interference with conscience or infringement of natural and indefeasible right.

In the last case, *Specht v. The Commonwealth*, (8 Barr, 322,) the court says: "The Constitution of this State secures freedom of conscience and equality of religious rights. No man living under the protection of our institutions can be coerced to profess any form of religious belief, or to practise any peculiar mode of worship in preference to another." In this respect, the Christian, the Jew, the Mahometan, and the Pagan, are alike entitled to protection; nay, the Infidel, who madly rejects all belief in a Divine Essence, may safely do so in reference to civil punishment, so long as he refrains from the wanton and malicious proclamation of his opinions with intent to outrage the moral and religious convictions of a community, the vast majority of whom are Christians; but beyond this, conscientious doctrines can claim no immunity from the operation of general laws made for the government, and to promote the welfare of the whole people." In the language of Chief Justice Gibson, "the right of conscience,

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as understood under our organic law, is simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever, or to support any religion; and to do, or forbear to do any act for conscience' sake, the doing or forbearing of which is not prejudicial to the public weal." (Commonwealth v. Leshner, 17 Serg. & Ra. 160; enforced in Simmons v. Gratz, 2 Penn. 416.) Nor is any preference given to any particular church, all are placed precisely on a like foundation. A loyal man, as well as a disloyal one, may refuse to accept of the prescribed qualifications, and then he falls under the same disabilities.

But it is not necessary to pursue this subject further; even if an apparent inconsistency existed, we would not be warranted in declaring this part of the Constitution void. All of the different parts compose one instrument, which constitutes our organic law. The presumption is, that each and every part was intended to be so restrained and construed as to give effect to the whole. This is according to the well known rules of construction. It is a well established principle of law, that courts are not at liberty to declare an act of the Legislature unconstitutional and void, unless its repugnancy is clear and manifest. Respect for a co-ordinate branch of the government, the presumption that they have not transcended their powers or passed beyond the bounds of their legitimate sphere, invoke every intendment in behalf of their action. Every doubt is to be thrown in favor of the law. This is the rule in favor of ordinary enactments. (Adams v. Howe, 14 Mass. 345; *Ex parte* McCollom, 1 Cow. 564; Morris v. The People, 3 Denio, 381.) Now constitutional ordinances are high above mere legislative acts. (Butler v. Pennsylvania, 10 How. 415.)

It has been said by an eminent judge, when speaking of the subject of constitutional construction and of the powers of Conventions, "It was competent to deal—subject to satisfaction by the people, and to the Constitution of the Federal Government—with all private and social rights, and with all

the existing laws and institutions of the State. If the Convention had so willed, and the people had concurred, all former grants and charters might have been annihilated. When, therefore, we are seeking for the true construction of a constitutional provision, we are constantly to bear in mind that its authors were not executing a delegated authority, limited by other constitutional restraints, but are to look upon them as founders of a State, intent only upon establishing such principles as seemed best calculated to produce good government and promote the public happiness, at the expense of any and all existing institutions which might stand in their way." (In the matter of Oliver Lee & Co's Bank, 21 N. Y. 12, per Denio, J.)

But a direct appeal has been made to us to decide against the particular provisions in the Constitution under consideration, because they are contrary to justice and the fundamental principles of our institutions. With their justice or injustice, policy or impolicy, we have nothing to do. It is not for the judiciary to inquire whether laws violate the general principles of liberty or natural justice, or whether they are wise and expedient or not. They can only declare whether they are repugnant to constitutional provisions and limitations. It would be a violation of well established and safe principles for courts to resort to any other test. There is no higher law by which we can be governed. An attempt by judicial construction to obstruct a law, or a failure to enforce it, would be monstrous usurpation. We cannot make or repeal a law; we are not entrusted with any such power. If it is wrong, unjust or oppressive, an appeal must be made to the people in their political capacity at the polls, to apply the remedy. We will not attempt to exercise judicial legislation. We can scarcely conceive of any thing that would be a compensation for introducing into our jurisprudence such a pernicious doctrine.

The most odious and dangerous of all laws would be those depending on the discretion of judges. Lord Camden, one of the greatest and purest of English judges, said, "that the

State ex inf. v. Bernoudy.

discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature can be liable."

Courts cannot go beyond their defined powers to avoid the hardship of extreme cases. The Constitution, in this instance, having prescribed all the essential details for its enforcement, a legislative act is not necessary.

The judgment is affirmed. The other judges concur.



26	279
142	336
86	279
178	393

THE STATE OF MISSOURI UPON INFORMATION OF CIRCUIT ATTORNEY, Appellant, v. ALFRED C. BERNOUDY, Respondent.

Constitution—Officers—Quo warranto.—Under the new Constitution, officers failing to take and file the oath prescribed, forfeit their offices, and upon a proper information judgment of ouster will be entered.

Bernoudy was elected recorder for St. Louis county in 1860. An ordinance of the Convention assembled in 1865, removed from office all the judges, clerks, recorders, &c., and authorized the Governor to fill the vacancies thus created. The Governor appointed J. C. Conrad to the office held by Bernoudy, who, refusing to quit, an application was made to the St. Louis Circuit Court for a *quo warranto*. The Circuit Court held, that the Convention had exceeded its powers, and that the office was not vacant, from which judgment an appeal was taken. After the new Constitution went into effect, Bernoudy having failed to take and file the oath therein prescribed, application was made to the Supreme Court for an information in the nature of a *quo warranto*, alleging that Conrad had been appointed recorder and had taken the oath.

The defendant appeared and moved for a change of venue, for the reasons that the judges were prejudiced against him,

and were also interested in the question at issue. The motion was overruled.

Defendant then demurred to the petition, because the petition did not name any person at whose relation it was filed. The demurrer was overruled.

Defendant then answered, alleging that the Constitution was to take effect when it should appear that at the election held June 6, 1865, a majority of the votes were cast in favor of its adoption, and denying that it did appear that a majority of the votes cast were in favor of the new Constitution—denying Conrad's appointment to fill any vacancy—setting up also the appeal pending from the judgment of the St. Louis Circuit Court, and alleging also, that, by a special agreement between Conrad and himself, said Conrad was estopped from asserting that there was any vacancy caused by the respondent's failure to take and file the oath, which respondent admitted he had not taken, but that the whole matter was to be decided by the appeal.

The respondent also moved to dismiss the information, because the St. Louis Circuit Court only had jurisdiction, and the St. Louis County Court alone could fill the vacancy if any existed in the office, and because there was another action pending in this court on appeal. This motion was overruled.

The circuit attorney moved for judgment, because the answer upon its face showed that the respondent was not entitled to retain the office.

G. Von Deutch, for appellant.

Wm. C. Lackland, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This is an *ex-officio* information in the nature of *quo warranto*, filed in this court by the circuit attorney of the county of St. Louis against the defendant, for usurpation of the office of recorder of said county, and praying judgment of ouster and costs. The defendant filed his answer or plea, on

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which the circuit attorney on behalf of the State now asks judgment by motion in the nature of a demurrer. The plea or answer of the defendant contains nothing which constitutes any valid defence in law or fact to the information.

The motion is sustained; and the court further considering that no evidence is offered to charge the defendant with any evil intent, and it being probable that he acted from mistaken views only, will not avail itself of the power given by law to impose a fine on him, and will condemn him to pay the cost only of this proceeding.

The other judges concur.

STATE TO USE OF ANDREW M. DRURY, Plaintiff in Error, v.
LAWSON G. DRURY *et al.*, Defendants in Error.

Guardian and Ward—Securities.—The securities of a curator who has committed a breach of his bond by converting the moneys of his ward to his own use, will be held liable upon their undertaking although the curator may have subsequently given an additional bond, and have made settlements carrying down the balance due his ward so as to make the securities upon the new bond also liable. A judgment against the securities in the second bond for the whole balance due at the last settlement of the curator, will not discharge the securities upon the first bond from their liability for any acts done before the second bond was given. There can be but one satisfaction, but the ward may pursue all his remedies until he has been fully paid. *Quere* as to the liability of the securities upon the different bonds to contribution.

Error to Montgomery Circuit Court.

For statement of facts, see opinion.

The following are the instructions asked by the plaintiff and refused:

1. If Drury was a member of the firm of Watkins & Drury, and did, in the year 1854, carry the money of his ward, A. M. Drury, into said firm, either as a loan or as a part of the capital stock of said firm, then that was a conversion of the funds in his hands as guardian, and a breach of his bond.

36	281
50a	168
36	281
91a	140
91a	145

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2. If Drury put the money in the firm of Watkins & Drury, a firm of which Drury was a member, and there was no special contract with the other member of said firm to pay interest, and said firm in fact did not pay interest on said money, then that was a breach of his bond.

8. If Drury, in the year 1854, used or appropriated the money of his ward to his own use, without first obtaining the leave of the County Court of Montgomery county and the assent of his securities, then that was a breach of his bond, and the plaintiff is entitled to recover the damages sustained by reason of his said unlawful conversion.

J. B. Henderson, for plaintiff in error.

I. The bond sued on is conditioned that the defendant Lawson G. Drury shall faithfully discharge his duties as curator. (R. C. 1845, p. 551, § 23 ; R. C. 1855, p. 827, § 3.)

II. If the act putting the money into the firm of Watkins & Drury without security and without leave of the court was an act not sanctioned by the law as it then stood, the condition of the bond was broken at the moment of investment and a right of action accrued ; and if through the consequences of this act the money thus invested was ultimately lost, the plaintiff is entitled to recover the amount of damages sustained by such wrongful investment. (R. C. 1845, p. 68, §§ 35-6-7 ; *id.* p. 550, § 17 ; 1 R. C. 1855, p. 825, § 18, & p. 120, § 39.)

III. The pendency of a suit on the second bond is no bar or obstacle to the prosecution of this suit, for a right of action may well exist on both bonds. The curator may have broken the condition of both.

IV. If the act of March 13, 1854, loaning the money to or investing it in the firm of Watkins & Drury, was an act of misconduct on the part of the curator—one not in accordance to the law regulating the disposition of such funds—then no settlements made by the curator after giving the second bond can affect the right of the ward to sue on such original breach and recover the damages sustained in conse-

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quence thereof. If such were the case, the curator would enjoy the advantage of making evidence in his own behalf, and thus curing a violation of his contract by a false statement of his own. The cases, therefore, cited by defendants' counsel in 27 and 34 Mo., were never intended to sustain such a position.

Dyer, for defendants in error.

I. The plaintiff will not be permitted to go behind the settlements of the county court to show that there was no money in the hands of the guardian at the time the second bond was given. The settlements in the county court are judgments, and are binding upon the securities. (*Taylor v. Hunt's Exec'r*, and others, 34 Mo. 205; *State to use of Griffith v. Holt*, 27 Mo. 340, and authorities there cited; *Mitchell v. Williams*, 27 Mo. 399, and authorities there cited.)

II. The court below rendered a judgment against the principal and his securities on the second bond for the amount of money, and for the same breaches that they seek to recover on in this case. The plaintiff is entitled to but one judgment.

III. The record shows that the amount ascertained to be due the ward in the settlement of the guardian in 1857, at the time and before the first bondsmen were released, was carried forward by the guardian in his subsequent settlements (and after the execution of the second bond and the release of the securities of the first) as so much on hand, and was by the county court in its judgment found correct.

HOLMES, Judge, delivered the opinion of the court.

This was a suit upon a curator's bond against the principal and his securities, founded upon breaches which occurred during the period of their liability, and before the securities were discharged from any further liability for the failure or misconduct of their principal, in consequence of a new and additional bond, with new securities, having been ordered and given to the satisfaction of the county court. There

was ample evidence tending to establish several of the breaches alleged during the period of the liability of the defendants.

It appeared that the curator had converted the funds of his ward to his own use, by investing them in the business of a mercantile partnership of which he was a member, without taking security of any kind, and without the leave of the court or the consent of the securities, but that he had made annual settlements with the county court having jurisdiction of such matters; that when he was required by the court to give a supplemental bond, and at the time when the new bond was given, his last settlement showed a balance in his hands amounting to \$6,121.61; and that, at the next term after the new bond was given, another settlement was made showing a balance of \$6,510.01 against him. This balance was demanded by his successor, who had been duly appointed, and payment was refused. The correctness of the accounts thus settled was not disputed.

It further appears that a suit had been brought by the successor, in the name of the State to the use of his ward, against the principal and his securities on the second bond, grounded upon breaches alleged to have taken place after the second bond was given, and chiefly upon the failure of the removed curator to pay over the balance ascertained to be due by his last settlement, and that a judgment had been obtained against them for the amount. The defence had been set up in the suit, that the money shown by the last settlement to be due was not then actually in the hands of the curator, but that the whole amount had been wasted during the period of the first bond. This defence appears to have proved unavailing.

At the close of the evidence on the trial of the cause, instructions were asked by the plaintiff to the effect that the investment of the funds in the partnership business, with or without a special contract to pay interest, or an appropriation of the funds by the curator to his own use without the leave of the court and the assent of the securities, was a

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conversion of the funds and a breach of the bond which made the defendants liable. These instructions were refused, and the verdict being for the defendants, there was a motion for a new trial, and the case comes up by writ of error.

It is contended, on the part of the defendants, that the settlements of the curator were judgments, and conclusive in exoneration of the securities on the first bond, and that the plaintiff here, having obtained one judgment upon the second bond, is not now entitled to have another upon the first bond for the same breaches.

It is to be observed, first, that it clearly appears by the record, that the breaches assigned in the two suits are not entirely the same. Those alleged in the former suit consisted merely in the refusal or failure of the removed curator to account for and pay over to his successor the balance in his hands as ascertained by his last settlement. In this suit, the first two breaches assigned are indeed essentially the same as before, but the last three allege a conversion of the funds during the period of the first bond, in such manner as to show gross misconduct and a clear breach of trust, and, in consequence thereof, a failure and refusal to pay over to his successor the balance of his last settlement. The instructions which were refused may be considered as having been predicated upon these last breaches; and the plaintiff was entitled to recover if he established either one of them, unless some valid defence was shown.

The bond of the curator was conditioned for the faithful discharge of his duties according to law, as the statute required (R. C. 1845, p. 550, § 17), and the same statute gave the court power "to order supplementary security to be given for the same causes, in the same manner, and with like effect," as in cases of administrators (§ 17); and the "Act concerning administrators" (R. C. 1845, p. 88, § 37) provided "that such additional bond, when given and approved, shall discharge the former securities from any liability arising from any misconduct of the principal after filing the

same, and such former securities shall only be liable for such misconduct as happened prior to the giving of such new bond." The plain intent of these acts was that the security should be accumulative, and not an entire substitution of the one bond for the other. It is not a novation, which is either a necessary or a voluntary and intentional substitution of the one obligation for the other, whereby the former would become wholly extinguished. (Burge on Sur. 187.) This matter is not left open to construction; for the act expressly declares that the new bond shall not discharge the securities in the former bond from any liability arising from the misconduct of their principal prior to the giving of such new bond; they are discharged only from liability arising from any misconduct or failure of the principal after the new bond is given.

Now, in so far as the failure of the curator to pay over the balance of his last settlement to his successor alone constituted the breach and the failure to perform his duty according to law, it may be truly said to have taken place wholly under the second bond; and for that alone the securities in that bond were clearly liable. On the other hand, it is equally clear that for any breach predicated upon misconduct occurring during the period of the first bond, and before the giving of the second, or upon any failure to discharge his duties according to law during that time, whereby a loss was occasioned, the securities on the first bond can alone be held liable. But in order that such a breach should be available to the plaintiff, and entitle him to recover, it was necessary that he should make it appear that the misconduct complained of had resulted in actual loss to his ward; and, therefore, it was entirely proper that he should, at the same time, allege as a part of the breach, that the curator had also failed to pay over to his successor, after his removal, the amount of funds in his hands, as ascertained by his last previous settlement. His cause of action against the defendants did not accrue until the curator had failed,

or refused, to account for and pay over to his successor the balance found due by his settlement, and his default had become complete. (Burge on Sur. 322.)

It might be seriously questioned whether, under the first two breaches here assigned, evidence would have been admissible to show a loss arising from any other misconduct, or any other failure of duty, than that averred in those breaches, namely, the failure to pay over the balance of the last settlement; but the evidence which was offered was clearly admissible on the three last breaches, and it furnished a sufficient basis for the instructions which were asked by the plaintiff. Indeed, it would seem to be clear that the two first breaches were grounded upon a failure of duty which occurred wholly during the time of the second bond, and that on them alone the defendants in this case would not be held liable, for the statute declares that they shall not be liable for any misconduct of the principal occurring after the giving of the new bond. And it appears to have been precisely on this breach and failure of duty, that the recovery was had on the second bond, in the former suit.

The other breaches were proved, as alleged in this case, beyond any doubt; and the evidence showed a case of gross misconduct, during the period of the first bond, which finally resulted in actual loss to the ward. The affirmative of the issue was fully established. By the express terms of the bond, the securities had undertaken to be responsible for any loss that should occur during the period of their liability, by reason of any failure on the part of their principal to discharge his duties according to law. The case of the State to the use of Smith v. Paul's Exec'r (21 Mo. 51) was in many respects very much like this. The bond of the curator was exhibited as a demand in the probate court against Paul's estate, and similar breaches were relied upon. Paul, the surety, had died, and a new bond had been given after his death, and the settlements of the curator had been carried forward into the time of the new bond, showing a balance due the ward. The plaintiff had waived the presumption that

would have arisen against the securities in the second bond from the fact of a settlement, that the money still remained in the hands of the curator, and proceeded at once against the surety in the first bond, basing her demand upon the misconduct of the principal in converting the money to his own use, in fact, during the time when Paul was security; and it was held that, in order to establish her demand against Paul, the surety in the first bond, the burden of proof lay upon her to show that the money had been actually spent or converted whilst Paul was security. And it was averred as part of the breach alleged, not only that the money had been wasted, but that the curator had failed to pay over to his successor, on demand, the balance ascertained to be due by the last settlement, which had been made under the second bond. The decision distinctly recognizes the position here taken, that if a conversion of the funds took place during the time of the first bond, whereby a loss occurred, the defendants must be held liable, notwithstanding there may have been a breach and a liability under the second bond also.

It is insisted for the defendants that the last settlement of the curator was a judgment of a court of competent jurisdiction, and conclusive at law upon all parties. It is not to be questioned that settlements of this kind are equivalent to judgments, and conclusive at law between the parties, as to the existence of the debt and the correctness of the account thus settled and adjudicated; and they can be re-examined only in a court of equity on the ground of fraud, or under some other head of equitable jurisdiction (*Jones v. Bunker*, 20 Mo. 87; *State v. Roland*, 23 Mo. 95; *State v. Grace*, 26 Mo. 87; *Mitchell v. Williams*, 27 Mo. 399); and they are held to be equally conclusive, to the same effect, and for the same purposes, against the securities on official bonds of this nature depending on the express terms of their engagement, and not merely upon the simple relation of principal and surety. (*State v. Holt*, 27 Mo. 340; *Taylor v. Hunt*, 34 Mo. 207.)

But here, the correctness of the account thus settled, and

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the validity of the settlement as a judgment which ascertains the fact and amount of the indebtedness of the curator, are not at all called in question. The inquiry here is only concerning the misconduct of the curator and his failure to discharge his duties according to law during the period of the first bond, whereby he has rendered himself unable to pay the debt so conclusively ascertained, thus occasioning a loss to his ward, which is the very thing for which the securities undertook to be liable on their bond. In such case, the obligation of the securities does not expire, when the period of time for which they became responsible has expired, either by the terms of the instrument or by force of the statute, unless there has been no act or default by the principal during that period, whereby a loss has occurred. (Burge on Sur. 113.)

Nor can it make any difference that there may be at the same time two judgments against different sets of securities on distinct bonds; for, as we have seen, the intent of the statute is, that the security shall be supplementary, additional and cumulative. The debt, or cause of action on the first bond, was merged in the judgment; but the judgment is still only a security for the original cause of action, and until full satisfaction be made it cannot operate to discharge or extinguish any other collateral and concurrent remedy which the plaintiff may have. (Burge on Sur. 178; Drake v. Mitchell, 8 East. 258.) Of course, there can be but one satisfaction; but the plaintiff has the right to pursue his remedies against all parties who have become responsible to him, until he has been fully paid.

To what extent, or in what cases, there might be ground for contribution among the securities on the two distinct bonds, after payment, we are not now called upon to decide.

We are of the opinion that the instructions asked by the plaintiff should have been given, and that a new trial should be granted.

Judgment reversed and cause remanded. Judge Wagner concurs. Judge Lovelace not sitting, having been of counsel.

EDWIN DRAPER *et al.*, Defendants in Error, *Ex parte petition*,
v. SAMUEL O. MINOR *et al.*, Plaintiffs in Error.

Conveyances—Uses and Trusts—Trustees.—In consideration of the payment of the sum of \$500, M. conveyed land to nine persons as trustees of the Methodist Episcopal Church South, and to them and their successors in office lawfully appointed forever; one of the grantees died, and another removed from the State; *held*, that the Circuit Court had no authority to fill the vacancies and appoint new trustees under the act. (R. C. 1855, p. 1554, § 1.) *Held, further*, that if the consideration was paid by the persons constituting the church, that a court of equity would, upon the application of the church, fill the vacancies existing by appointing as trustees such persons as the church might select; but if the money was paid by the grantees, that then the legal title would belong to them and no appointment was needed.

Error to Louisiana Court of Common Pleas.

S. S. Allen, for plaintiffs in error.

I. The church, by means of its preacher in charge and Quarterly Conference, had full and ample power to fill vacancies in its board of trustees. (See "Doctrines and Discipline of the Methodist Episcopal Church," p. 254.)

II. Over the church, as such, the temporal courts of this country most clearly have no jurisdiction, except to protect them and to protect the civil rights of others, and to preserve the public peace, none of which were necessary in this case. (See Baptist Church in Hartford v. Withnell, 3 Paige, ch. 301; Sawyer v. Cipperly, 7 Paige, 281; Ang. on Corp. § 58, note 1, 29; Stebbens v. Jennings, 10 Pick. 172; Gable v. Miller, *id.* 10 Pick. 627.)

III. There were no vacancies in the board when the court below acted, said vacancies having been duly filled by the preacher and Conference long before the court acted. (See "Minutes of the Conference.")

Dyer & Campbell, for defendants in error.

LOVELACE, Judge, delivered the opinion of the court.

The petitioners filed an *ex parte* petition in the Louisiana

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Court of Common Pleas, at the July term of said court, 1863, setting forth that on the 11th day of June, 1853, Edward G. McQuie and wife, by their deed of that date, conveyed to petitioners, to wit, Edwin Draper, John S. Markley, John W. Allen, Samuel O. Minor, John Schurmur, Jos. Charleville, Ivey Zumalt, David Watson, and Thomas T. Stokes, certain real estate in the city of Louisiana, in Pike county, Missouri, describing the land fully. That the deed to said tract of land was made for and in consideration of the sum of five hundred dollars, paid by them to said McQuie, and that said conveyance was made to them as trustees of the Methodist Episcopal Church South, for the station of Louisiana, in said county, and to their successors lawfully appointed forever. The petition then sets out the improvements made on the land, and the purposes for which they were made. The petition then goes on to state that in 1859, David Watson, one of the grantees in said deed, departed this life without having conveyed the legal title vested in him to his successor; and that in 1861, Thomas T. Stokes ceased to be a member of said church by withdrawing from the same, and that he has also left the State of Missouri, without having conveyed his interest or legal title to a successor. The petition then closes by asking to have successors appointed in place of Watson and Stokes, and that the legal title of Watson and Stokes be decreed in their successors thus appointed, &c.

Upon this petition the court appointed Charles Hunter to fill the place of David Watson, and Robert S. Strauther to fill the place of Thomas T. Stokes.

And afterwards, but during the same term of the court, Samuel O. Minor, John W. Allen, Ivey Zumalt, William A. Gun, and Samuel S. Allen, filed a petition asking the court to vacate the order appointing Hunter and Strauther, and set out the following facts, among others, why the order ought to be vacated. They admit the death of Watson, and that a vacancy was thereby created; but they say that on the 21st day of January, 1861, and after the death of said Watson,

the Rev. William H. Newland, who was the preacher in charge of said church at Louisiana station, at a Quarterly Conference then being held in said city, did nominate one of the last mentioned petitioners, William A. Gun, to fill the vacancy in said board created by the death of Watson, subject to the confirmation or rejection of said Quarterly Conference, according to the rules, laws and discipline of the said Methodist Church South, in such cases made and provided; and that thereupon the Quarterly Conference confirmed the nomination of said Gun, and that said Gun accepted said appointment, and became a member of said board of trustees; and that no vacancy exists on account of the death of said Watson.

And with regard to the vacancy occasioned by the withdrawal from the church and removal from the State of said Stokes, they state that Samuel S. Allen, another of said petitioners, was regularly appointed, according to the rules of said church, on the 23d day of April, 1862. They therefore insist that no vacancy existed in the board at the time Hunter and Strauther were appointed, and that the order appointing them ought to be vacated.

They further aver that the names of John W. Allen, Samuel O. Minor, and Ivey Zumalt, were used in the original petition without their knowledge or consent, and insist that the order ought to be vacated for that reason.

The court refused to vacate the order appointing Hunter and Strauther, and the last mentioned petitioners excepted, and bring the cause here by writ of error.

The case is not free from difficulties. The court below seemed to be acting under the statute concerning "Trusts and Trustees." But this case does not fall within the statute, for that only provides for appointing trustees in deeds of trust made to secure the payment of a debt or other liability. (R. C. 1855, p. 1554, § 1.) So in this case, it would seem that the parties must resort to their equitable remedy to prevent the trust from being defeated for want of a trustee.

There are more informalities that appear upon the record,

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but they are not alluded to by either party. The question presented by the parties is, whether there are vacancies in the board of trustees to be filled. Both parties admit that there have been vacancies, but the defendants contend that the vacancies have been filled by the church according to the rules and discipline of that church, and the evidence proves conclusively that the board of trustees for church purposes, under the rules and discipline of the church, had been filled; but whether, under the peculiarities of this deed, the legal title to the property described in the deed will descend to the trustees thus appointed seems doubtful. The uses and purposes for which the property is to be used is not expressed in the deed, but the property is merely deeded to the petitioners, naming them, together with Watson and Stokes, describing them as "Trustees of the Methodist Episcopal Church South," and to them and their successors in office, lawfully appointed, forever, for a consideration of five hundred dollars. It is not stated, except as mentioned in the deed, though it may perhaps be inferred, that the petitioners at the time of the conveyance were in fact trustees of the church, appointed by the church under its rules and discipline; nor does it appear who furnished the money to purchase the property. If it was furnished by the church, then most certainly the court, upon proper application, would order these plaintiffs to convey it to such person or persons as the church might name, to hold it for their use and benefit; but if, on the contrary, the money was furnished by these plaintiffs, the naked fact that the grantors in the deed have described them as "Trustees of the Methodist Episcopal Church South" would not of itself operate to destroy their interest in the property. In the former case they would hold the property in trust for the church, and would be compelled to convey to any persons the church might nominate to receive it; but this could only be done upon proof of the fact that the church furnished the money with which the property was purchased. Upon the face of this deed, the property belongs to the grantees in the deed;

and to divest them of title, it must be shown *aliunde* that the purchase money was furnished by the church. The legal title is in the grantees; but in case somebody else furnished the purchase money, then the grantees will be regarded as holding the property in trust for whomsoever furnished the purchase money.

If, then, the above views be correct, there can be no question of vacancy in the board of trustees as respects this property, until the question of the title is first settled. If it belongs to the grantees, no trustees are necessary; they can manage it for themselves. If the church is entitled to it, then the grantees must first be divested of their title, and the title vested in some person or persons for the use of the church.

The proceedings here are irregular and premature. The judgment must be reversed and the cause dismissed. The other judges concur.



THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Plaintiff in Error, v. MARION COUNTY, Defendant in Error.

1. *Practice—Evidence—Objections.*—Objections made to the admission of evidence, without specifying the reasons therefor, will not be noticed in the appellate court.
2. *Corporations—Counties.*—Corporations must act strictly within the limits of the powers conferred upon them by the act creating them. A county is a political division of the State, and a *quasi* corporation—performing in part the duties of the State, as an auxiliary of the government and a trustee for the people. An act of the Legislature investing the county court with power to do certain acts, necessarily implies the right to use the fit and appropriate means. Where, by an order of record, the county court ordered that a subscription be made for the stock of a railroad in accordance with an authority conferred by the charter of the company, a subsequent order of the court appointing an agent to enter the subscription upon the books of the company was a proper method for completing the subscription; the agent was a mere instrument executing an order. A subsequent ratification of the subscription by the court, under an act authorizing the same, would make the contract binding although it had been originally void.
3. *Estoppel—Corporations, municipal.*—Where a county, acting under an authority it supposed to be valid, subscribed to the stock of a railroad compa-

36	294
120	504
36	294
144	588
36	294
155	500
36	294
173	411
e173	465
98a	236

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ny in good faith—issued its coupon notes in payment of such subscription—for a series of years voted such stock and paid its coupons—and such notes passed into the hands of innocent and *bona fide* purchasers,—it is estopped from asserting that such notes were illegally issued.*

Error to Marion Circuit Court.

Jos. L. Hart, for plaintiff in error.

I. The county had no power, in the absence of an express legislative enactment, to subscribe for stock in the railroad company and issue its notes or bonds therefor.

A county is a territorial division, such as a senatorial district for the election of a State senator—a congressional district—a judicial circuit. It is not a corporation or artificial person, hence has not the general powers of a corporation. (15 Johns. 382; N. York Fire Ins. Co. v. Ely, 2 Cow. 699; Ang. & Ames, § 2 & 256.)

The 4th sec. of plaintiff's charter exhausts its force in re-enacting such clauses of the charter of the Louisiana and Columbia Railroad Company (and such only) as imposed restrictions on that company, or granted to that company rights, privileges or immunities. The 16th sec. of the charter of the Louisiana and Columbia Railroad Company, relied on, does not come within the scope of the 4th sec. of plaintiff's charter.

The first legislative enactment authorizing Marion County to subscribe for stock was the act approved Feb. 23, 1853; the 1st. sec. of that act confers power on the county to subscribe for stock in plaintiff's company. The subscription having been made some months previous, is void for want of power. (3 Wend. 485; 2 Cow. 709.) The subscription is void because not made by the proper agent. The county court is the agent, and only agent, authorized by law to bind the corporation by making a subscription. (Act of Feb. 23, 1853, § 1; Ang. & Ames on Corp. § 1, p. 256; Bealy v. Marine Ins. Co. 2 Johns. 114; 26 Wend. 496; Ang. & A. § 277 & 279; 12 Mass. 248; 8 Serg. & R. 521.)

* See *Moran v. Commissioners of Miami County*, 2 Black, (U. S.) 722.

There is no authority of law for issuing the \$1,000 stock note No. 28. The county was authorized to issue its bonds by the act of Feb. 23, 1858; but it was not authorized to issue a parol contract, a stock note like this, and it is therefore void and the county is not bound. (3 Wend. 485; Ang. & A. § 231, 252 *a.* & 291; Head v. Providence Ins. Co. 2 Cranch, 168; N. Y. Fire Ins. Co. v. Ely, 5 Cow. 568; Dawes v. N. Y. Ins. Co., 7 Cow. 465; 8 Gill & J. 318; 3 Wend. 485; Ang. & A. § 231, 252 *a.* & 291; 11 Humph., Tenn. 20.)

The corporation (i. e. the defendant) may avail itself of the want of authority to make the contract, although it may have received the consideration. (Albert & wife v. Savings Bk. of Baltimore, 1 Md. Ch. Dec. 418; 8 Gill & Johns. 318; Ang. & A. § 256.) The doctrine of estoppel does not apply. (Pa. & Md. Steam Nav. Co. v. Dandridge, 8 Gill & J. 319; Ang. & A. § 256.) The plaintiff was bound to take notice of the limitations on defendant's power to contract; he cannot plead ignorance of the law. (Ang. & A. § 265; Root v. Goddard, 3 McLean, 103.)

II. The act, so far as it seeks to make a previous void act binding, is retrospective, conflicts with the 17th sec. of the 13th art. of the State Constitution and is therefore void.

The doctrine in the case of the Commis'rs of Knox Co., Ind., v. Aspinwall et al. does not conflict with the authorities cited to show this stock note void. (21 How. 54.)

In the case at bar the question is not a question of good faith, but a naked question of power bearing on a law that all persons are bound to know at their peril.

In Flagg et al. v. City of Palmyra, held that the law authorized the corporation to issue the kind of instruments it did issue for the purpose for which they were issued; that *bona fide* holders in such a case will not be held to inquire into all the formal prerequisites to the issuance of the bonds, but will be held to a knowledge of the law. Under the principle thus laid down, had the instrument been a parol contract, and not a bond, the decision would have been for the city.

To hold that a corporation created for a specific purpose, with limited powers, is estopped from inquiring into the extent of its powers, and from defending on the ground that its agents exceeded their authority, would place the corporation at the mercy of its agent; and to hold the agents of a corporation may bind it by their act, in the absence of any power conferred by law, simply by repeated illegal acts by way of ratifying the original act, would be to enable the corporation by the act of its agents to get rid of all restrictions on its powers by acts of usurpation of power in the beginning and subsequent acts of ratification. Such a principle is repugnant to the whole theory of the law in regard to corporations created for a special purpose, and would prove dangerous in practice.

Carr, for defendant in error.

Defendant in error contends that the public faith underlies this whole case, and that in times like these when nine-tenths of the commerce and trade of the whole nation is carried on through and by the medium of city, county, state and national securities or obligations, with nothing but plighted public faith to redeem them, that it should be the policy of the courts of the country to so construe those securities and obligations, as to give them the highest standard of commercial paper at home and abroad.

I. Marion County had the power through its county court to subscribe for the one thousand shares of capital stock, and to issue her notes for such subscription. (See §§ 16 & 17 of charter of Louisiana and Columbia R.R. Co., approved January 27, 1837; p. 13, § 4, act February 16, 1847.) Even if there should be doubt as to the power or right of Marion County by its county court to subscribe for the stock of the railroad company prior to February 23, 1853, that power is fully given by the Legislature of the State and subsequent approval of the original subscription by the county court. (See § 6 of "An act to amend an act to incorporate the Hannibal and St. Joseph Railroad Co., Feb. 23, 1853, p. 16.)

The character of the obligation issued by the county in payment of its subscription for the railroad stock was in conformity to the statutes above cited, both in form and legal effect. The fact that the notes when issued were called bonds, cannot change their legal effect, nor can such designation alter the law under which said notes were issued. The acts of estoppel cannot be disregarded by the courts, and public policy and faith and honest dealing require that the county should be concluded thereby. (21 How. 539.)

The county after having issued these securities, accompanied by orders of the county court inviting public confidence, is as much estopped from setting up informality as a defence to the same extent that an individual would be. (23 How. 381; S. C. 24 How. 365, 450.) The county court was authorized to issue these notes in payment of its subscription, and the notes reciting the facts show them to have been regularly issued; the county is thereby estopped to deny their regularity, or to assert that they were not made in conformity to the statute. (2 Black. U. S., S. C. 722; 1 Black, 386; 33 Mo. 440; 1 Wal. S. C. 175.) The ratification by the Legislature, and approval by the county court, made the subscription and notes binding. (8 Gray, 575; 15 Conn. 475; 5 Wheat. 326.)

WAGNER, Judge, delivered the opinion of the court.

This is a suit brought by the Hannibal and St. Joseph Railroad Company against Marion County, on a warrant for sixty dollars, being the amount of one year's interest which had accrued on a note given by said county to said company in payment of subscription on stock.

By section four of said company's charter, which was approved February 16, 1847, it is enacted: "The said company shall have power to view, lay out, and construct a railroad from St. Joseph in Buchanan county, to Palmyra in Marion county, and thence to Hannibal in said county of Marion, and shall in all things be subjected to the same restrictions and entitled to all the privileges, rights and immunities,

which were granted to the Louisiana and Columbia Railroad Company by an act entitled "An act to incorporate the Louisiana and Columbia Railroad Company," passed at the session of the General Assembly in 1836 and 1837, and approved January 27, 1837, so far as the same are applicable to the company hereby created as fully and completely as if the same were herein re-enacted." By the charter of the Louisiana and Columbia Railroad Company above referred to, it is provided :

" § 16. It shall be lawful for the county courts of the respective counties on said road to subscribe for such portions of the stock of said company as they may deem proper, and upon such terms as they may agree with the company. When any county shall have subscribed for any portion of the stock, the justices of the county court may issue the notes of the county for such subscription, which shall be signed by all the justices, and attested by the clerk, and shall be payable in such times and places as may be agreed upon ; *provided*, said notes shall not in any event bear a greater rate of interest than seven per cent. per annum : all proceedings in relation thereto shall be entered on the records of the court.

" § 17. When any stock shall have been subscribed for by the county, the justices shall have a right to vote on behalf of the county at any election, and they may at any time require of the directors information concerning the affairs of the company."

On the 4th day of February, 1852, whilst the county court of Marion county was in session, the directors of the said railroad company, by their agent, moved the court to subscribe one thousand shares, of one hundred dollars each, of stock to said company ; which proposition was assented to by said court by an order entered of record, and certain persons designated by the court to draw up the form for the notes or bonds to be issued by the county in payment of the shares of stock. And at a subsequent term of the said county

court, the following proceedings were had, as appears by the record :

“Whereas, it appears to the satisfaction of the court that an order made on the 4th day of February last, in regard to the county subscribing one thousand shares to the Hannibal and St. Joseph railroad, has never been carried into effect in consequence of the court failing to appoint an agent to subscribe the same, it is therefore ordered that John Rice, Esq., the president of this court, be and he is hereby appointed the agent of this court to subscribe for said stock according to the order before referred to.”

In pursuance of this authority, Rice, the agent, proceeded to subscribe the one thousand shares of stock, in behalf of said county, and received certificates to that effect from the said railroad company. The court from time to time issued stock notes, in instalments to meet the various calls made by the company, all of which notes were due and payable twenty years after date, bearing interest from date at the rate of six per cent. per annum. The county court was regularly represented through an agent or agents duly appointed for that purpose, in all the meetings of the stockholders of said company, and continued to pay the annual interest accruing on the stock notes till the year 1860, when they made an order forbidding the county collector and treasurer to receive or pay the same. Before this, however, they had made an order proposing to call in the first of the original notes that were issued, and issue others in their stead, with coupon interest warrants attached, post-dated and falling due annually. This proposition, it seems, was accepted on the part of the holder of the notes, the railroad company. The following is a copy of the note, and the interest warrant arising thereon, on which the suit is brought:

“Marion County, Missouri.—\$1,000.—No. 28. Stock Note of Marion County.—To the Hannibal and St. Joseph Railroad Company: Twenty years after date, Marion County promises to pay to the Hannibal and St. Joseph

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Railroad Company a corporation created by an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Hannibal and St. Joseph Railroad Company," approved February 16, 1847, or order, at Palmyra, Missouri, the sum of one thousand dollars, for value received, with interest thereon, from and after the 15th day of September, A. D. 1855, at the rate of six per cent. per annum, payable annually thereafter at the said treasury. This being given by said county, and accepted by said company, in payment of so much of the stock in said railroad taken and subscribed by said county under the said act of the General Assembly. By order of the County Court of the said county of Marion, Palmyra, 15th September, 1855. Andrew Brown, A. D. Sprague, Thomas McMurry, Justices of Marion County Court. Attest: Thomas E. Hatcher, clerk of Marion County Court."

"\$60.00.—Palmyra, Marion county, September 15, 1860. Treasurer of the County of Marion: Pay to bearer sixty dollars, being interest due on the 15th day of September, 1860, on the bond of the County of Marion, No. 28, to the Hannibal and St. Joseph Railroad Company, issued in pursuance of an order of the County Court of said county, September 15, 1855. A. D. Sprague, President of Marion County Court. Countersigned: Thos. E. Hatcher, clerk."

In the amended charter of the Hannibal and St. Joseph Railroad Company, approved February 23, 1853, by section six it is declared, that, "in all cases where subscriptions of stock have heretofore been made by the county courts of any counties, the common council of any incorporated city, or the trustees of any incorporated town, such subscription shall be held valid and binding upon such counties, cities or town, if approved of hereafter by the said county courts, common council, or board of trustees, as the case may be."

On the 20th day of September, 1853, after the passage of the above act, the county court of Marion County made the following order: "It is ordered by the court that the pro-

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ceedings of this court on the 4th day of February, 1852, and on the 4th day of October, 1852, authorizing the subscribing of one thousand shares of stock to the Hannibal and St. Joseph Railroad, by their agent, for and on behalf of Marion County, be, and the same are hereby approved under the provisions of an act of the Legislature of the State of Missouri, approved February 23, 1853."

We have thus copied all the material facts in this case which are deemed necessary to its complete understanding. On the trial, the several orders of the county court touching and concerning the premises, as well as some oral evidence, were introduced for the plaintiff, to the receiving of which the defendant objected; but as the objections were all general, without specifying any reasons, they will not be noticed. When the plaintiff closed the testimony on its part, the defendant asked the court to give the instructions or declarations of law which are here transcribed:

1. That the county court of Marion county is the agent, and only agent, authorized by law to subscribe for stock on behalf of the county.

2. That the subscription made on behalf of the county by John Rice, is not binding on the defendant.

3. That the only instruments that the law authorizes the county court to issue in payment for stock are the *bonds* of the county; and the instrument read in evidence is not a bond, and is therefore not binding on the county.

4. That the county court is the only agent authorized by law to issue instruments in payment of subscriptions for stock, and the instrument read in evidence not having been issued by the county court, but by A. D. Sprague, Thomas McMurray, and Anderson Brown, justices, is not binding on the defendant.

5. That the act of February 23, 1853, so far as it operates to make the prior subscription binding on the defendant, is retrospective, and therefore unconstitutional and void.

6. That the law having pointed out the agent to make the contract on the part of the corporation, and prescribed the

mode in which it should be made, a contract made by any other agent, or in any other mode, is not binding on the corporation.

7. That the act of the county court in appointing agents to cast the vote of the county in the election of directors, and in authorizing warrants to issue in payment of interest, and appointing agents to sell stock, does not estop defendant from denying the validity of the instrument sued on, or of the subscription of the stock.

The court refused to give all of the above instructions, to which decision of the court the defendant excepted, and after moving for a new trial and in arrest of judgment, both of which motions were overruled, the case is brought here by writ of error.

The first objection urged against the legality of the action of the county court in making the subscription is, that the county court is a body of special and limited jurisdiction, and that they possessed no power to delegate authority to John Rice, their president, to act in their stead; that they, as a court, must make the subscription, else it is totally void. It will not be denied, but that corporations must act strictly within the scope of the powers conferred on them by the act calling them into being; and where a grant of power from the Legislature is relied on, the mode prescribed in that grant for doing any particular thing must be pursued according to the law creating it. A county is a political division, and denominated a *quasi* corporation; it assumes on itself some of the duties of the State, in a partial or detached form, and is to be considered in the light of an auxiliary of the government, and as a secondary and deputy trustee of the people. (*McKim v. Odom*, 8 Bland, ch. 417.) The county court is instituted by law with certain specific powers and jurisdictions in relation to probate and testamentary matters, the appointment of guardians, &c., and also has the control and management of the property, real and personal, of the county. It is the agent of the county, and has full power, and may lawfully and of right do whatever

is necessary to carry out and execute the trusts reposed in it. A grant from the Legislature investing the county court with power to do certain acts, necessarily implies the power to use the fit and appropriate instruments to accomplish the objects sought to be attained. When the Legislature empowered the county court to subscribe stock to the railroad company, it also clothed it with the means which might be convenient for making its action effectual. The substantive act was taking the stock; that was evident by the order of record made by the court; and the appointment of an agent to make the entry on the company's books, and receive the certificates, was a proper and convenient way for carrying out the details. The agent did not make the contract; it was made by the county court, and he was a mere instrument to execute an order.

By the fourth section of the original charter of the railroad company, it is provided that it in all things shall be subjected to the same restrictions, and entitled to all the privileges, rights and immunities, which were granted to the Louisiana and Columbia Railroad Company, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein re-enacted; and by the sixteenth section of the Louisiana and Columbia railroad charter the county courts were authorized to issue the notes of the county for subscription, signed by the justices and attested by the clerk. It was under this section that the court proceeded when the stock was first taken and the notes issued. The Legislature gives the company all the rights, privileges and immunities contained therein, the same as if it had been re-enacted. The language seems broad enough, by reasonable construction, to fully sustain the acts of the county court.

But if any doubts were entertained of their validity, by the sixth section of the amended charter it is enacted that "such subscription shall be held valid and binding upon such counties," &c., "if approved of hereafter by the said county court." Now, as we have heretofore seen, the county

court did, after the passage of this act, approve of the subscription, and ratify it so far as they had power by virtue of and in accordance with said act.

But it is contended that the act is afflicted with a constitutional infirmity, and that it is necessarily inoperative as a confirmatory act, because, if the proceedings of the court and its agents were void, previous to the passage of the act, by want of authority, they could not be rendered effectual for any purpose by means of legislation. Although individuals may not have the power to make good *ab initio* that which was originally void by subsequent deed or acts of confirmation, yet that principle has but a slight, if any, application to the case. The act of the Legislature does not purport to confirm, ratify and make unqualifiedly valid the proceedings of the county court by its own terms; it does not act *ex proprio vigore*, but delegates authority to those who had prior to that time subscribed for stock to approve of and confirm the same. It left the matter entirely optional with the county court, as the representative and agent of the county, to accept or reject the proffered remedy. They elected to ratify and affirm the subscription, and by that act they gave just the same effect to the contract to subscribe the stock, and to all the proceedings had by the county court in reference to it, as if they had had full authority in the first instance. Nor has the county any just cause of complaint from this conclusion, as it is obvious that the contract was entered into in good faith, and with the firm belief that ample power for the act existed; and the only effect of the legislative act, and the approval by the court, was to execute and fully carry out precisely what was intended, but which they found was not accomplished by a defect in their authority. The notes were made by the justices in a public capacity and in the line of their official duty; the contract enured to the benefit of the county, and the county was bound by the obligation thereby created. (*Hodgson v. Dexter*, 1 Cranch, 345; *Tutt v. Hobbs*, 17 Mo. 486.

Upon a full view of the case, it appears that both parties

acted with honesty and good faith; the county made the subscription to plaintiff's railroad, and received certificates of stock for said subscription like all other shareholders; that for nine years it had been regularly represented at the meetings of the stockholders and of the board of directors, and that during that period of time the interest accruing on the stock notes has been regularly and punctually paid. It appears also that many of these stock notes or obligations have passed into the hands of *bona fide* endorsees and innocent purchasers; their rights ought not to be impaired without good and substantial reasons.

In *Bissel v. The City of Jeffersonville* (24 Howard), a case resembling this in almost every particular, the Supreme Court of the United States says: "When the contract has been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for stock, it was then too late to call in question the facts determined by the common council." The Supreme Court of Ohio has also recognized the duty and binding obligation of corporate bodies to be vigilant in exposing illegalities or abuses in the employment of their powers, and have denied assistance where they have waited till the evil has been done, and the interest of innocent parties has become involved. (*Chapman v. Mad River R.R. Co.*, 6 Ohio, 119; *The State v. Van Horne*, 7 *id.* 327.)

The remarks of Lord St. Leonard (Sir Edward Sugden) in the House of Lords, in reference to the effect of conduct of a board of directors as determining the liability of a corporation, are applicable to the county court of Marion county under the circumstances and facts in this case. "It does appear to me," he observed, "that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn around, and *themselves* raise the objections that they have not taken these

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precautions, and that the shareholders ought to have inquired and ascertained the matter. The way, therefore, in which I propose to put it to your lordships, in point of law, is this: the question is not whether that irregularity can be considered as unimportant, or as being different in equity from what it is in law; but the question simply is, whether by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard in a court of justice, to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to an act which they themselves have neglected to do." (*Borgate v Shortridge*, 5 H. L. Cas. 297.)

The rules which regulate the business transactions of life, and which enjoin good faith, honesty and fair dealing, are alike applicable to individuals and corporations. The County of Marion, to aid a great public undertaking, which was to redound to the interests of its citizens, subscribed stock in a railroad enterprise; like all other shareholders, it received a certificate of stock, and now retains and holds the same, and continues to enjoy all the benefits derivable therefrom. Upon the strength of that subscription large sums have been expended, and important investments made. It would be grossly immoral and unjust to allow it to involve others in onerous engagements, and then, after lapse of ten years' silent acquiescence, repudiate its obligation.

The defence is purely technical and devoid of merit; the judgment is for the right party, and is affirmed. The other judges concur.

WILLIAM O. SUMMONS, Defendant in Error, v. JOSEPH BEAUBIEN AND WILLIAM AUSTIN, Plaintiffs in Error.

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78a	97
86	307
83a	5

1. *Practice—Courts—Recorder of Hannibal.*—By the act of 1851, p. 335, Art. VIII., in suits brought before the recorder of the city of Hannibal for the recovery of the possession of personal property, the practice must conform

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to that prescribed in suits brought in the Circuit Courts, and the case must be tried upon written pleadings.

2. *Possession—Title.*—An actual possession is evidence of title, against every one who does not show a better title. In the absence of other evidence, a prior lawful possession is proof of a better title.

Error to Hannibal Court of Common Pleas.

Ewing & Harrison, for plaintiffs in error.

I. The recorder of the city of Hannibal had jurisdiction of the subject matter of this suit, by virtue of an act of February 14, 1851. (Sec. 5, Art. 8.)

II. The jurisdiction being specially conferred on this officer, his proceeding in the case must be in strict accordance with the direction as to the mode of proceeding. The objection that the petition does not state facts sufficient to constitute a cause of action, is not waived by omission to take it by demurrer or answer. Defendant can avail himself of the objection by motion in arrest of judgment. (*Andrews v. Lynch*, 27 Mo. 167.)

III. The defendant Austin could only be made a party by an order of the court to have him brought in by an amendment of the petition or supplemental petition. (2 R. C. p. 1253, § 4.)

L. M. Shreve and J. C. Richmond, for defendant in error.

HOLMES, Judge, delivered the opinion of the court.

This was an appeal from the recorder of the city of Hannibal to the Hannibal Court of Common Pleas, from which it comes here by writ of error. By an act amendatory of the acts incorporating the city (Art. VIII., §§ 1-7, Acts of 1851, p. 335), the city recorder is invested with the powers and jurisdiction of a justice of the peace, and with special jurisdiction in certain other cases, among which are "actions for the recovery of personal property, alleged to be unlawfully detained," not exceeding one hundred dollars in value; and "actions in such cases are to be conducted after the rules

Summons v. Austin.

governing such actions in the Circuit Court." The marshal is to execute the process in the same manner as the sheriff does in similar actions in the Circuit Court, and appeals are to be allowed in the same manner as in cases before a justice of the peace; and the recorder is to "be governed and decide by the laws of the State." The plaintiff filed a petition, in writing, for the recovery of a horse, against Joseph Beau-bien, and, on the day of trial, on motion and affidavit of plaintiff, William Austin was made a party defendant by a simple order of court, and the trial proceeded without any amendment of the petition, and without any written answer by either party, and there was a verdict and judgment for the plaintiff, from which the defendants took an appeal. There was another trial in the Hannibal Court of Common Pleas, without any change in the pleadings, and the verdict and judgment were for the plaintiff. The defendant Beau-bien moved for a new trial, and Austin filed a motion in arrest. Both motions were overruled.

The statute evidently contemplates that the proceedings in such cases shall be upon written pleadings, as in the Circuit Court. There was no statement on file of any cause of action against the defendant Austin, and no written answer by either defendant; the courts below appear to have proceeded as in other cases before a justice of the peace, wholly disregarding the special provisions of this act. In this, we think, the error is manifest.

The plaintiff relied upon actual possession, merely, as proof of title. The evidence tended to prove that the defendant Austin had had an actual possession of the horse prior to that of the plaintiff, and that he kept the animal in a pasture near Hannibal; and that, afterwards, one Charles Davis bought the horse of a militiaman at a camp near Hannibal, and sold it to the plaintiff a month before the suit was commenced. An actual possession, which is a lawful one, is evidence against any one who does not show a better title—(2 Greenl. Ev., § 637); but the actual possession of the defendant here, which was prior to that of the plaintiff, in the ab-

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sence of any other evidence of ownership in the plaintiff, was a better title than that of the plaintiff. And, accordingly, the ruling of the court upon the instructions which were asked by either party, in so far as it disregarded this principle, was erroneous.

For these reasons the judgment will be reversed and the cause remanded. The other judges concur.

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BRISEN STILLWELL, Plaintiff in Error, v. THOMAS BOWLING,
Defendant in Error.

Contract—Sale—Delivery.—In a contract for the sale of goods to be delivered at a future day, where the place of delivery is not fixed by the terms of the contract, it is the duty of the seller to tender the goods at the residence or place of business of the purchaser; or if the goods be inconvenient to transport, he must seek the vendee a reasonable time before the day of delivery, and ask him to appoint the place of delivery.

Error to Hannibal Court of Common Pleas.

W. P. Harrison and E. B. Ewing, for plaintiff in error.

There is no specific place in Hannibal named for the delivery of said hogs, in said contract; but there is a specific time, viz., on or before the first day of January, 1856. In the absence of a particular place being specified for the delivery of said hogs, the law fixes a place. The first act has to be performed by the seller. He must then take the articles sold to the purchaser's residence, or place of business, and offer to deliver them there if they are portable; and if not, then he should seek the purchaser and ascertain from him where he wants the articles sold, delivered. By doing that he puts the purchaser in default, but not until then. (Barr v. Myers, 3 Watts & Sarg. 295; Currier v. Currier, 2 N. H. 75; Goodwin v. Holbrook, 4 Wend. 380; Lobdell v. Hopkins, 5 Cow. 516; Roberts v. Beatty, 2 Penn. 71; Brownson v. Gleason, 7 Barb. 472; Coke upon Litt. 210; 2 Pars. on Cont. 160-2, first ed.)

Carr, for defendant in error.

Stillwell v. Bowling.

LOVELACE, Judge, delivered the opinion of the court.

This action is founded upon a written contract, of which the following is a copy:

"Hannibal, July 16, 1855. I have this day bought of B. Stillwell, five hundred good corn fat hogs, weighing two hundred pounds and over, at five dollars per hundred pounds net, to be delivered on or before the first day of January, 1856, in Hannibal, to be delivered in lots as they usually come in. (Signed,) Thomas Bowling."

Between the day of execution of the contract and the day on or before which the hogs were to be delivered, the plaintiff notified the defendant that he had one hundred hogs at the packing-house of Shields, Stillwell & Co., in Hannibal, which he proposed to deliver on his contract; and that the defendant refused to receive them at that place, but gave immediate notice to the plaintiff that he was now receiving his hogs at the pork-house of Samuels & Moss, which was also in the city of Hannibal.

Upon this evidence the court instructed the jury to the effect, that the defendant might select any reasonably convenient place in the city of Hannibal for the delivery of the hogs under the contract, and that it was the duty of the plaintiff to deliver them at the place thus appointed by the defendant.

The plaintiff then took a non-suit with leave, and afterwards moved to set the same aside; which being overruled by the court, the case is brought here by writ of error.

The only question involved is as to the place of delivery. Which party had the right, under the contract, to appoint the place of delivery in the city of Hannibal? The rule seems to be for the delivery of portable articles, if neither time nor place is fixed by the contract, but they are to be delivered on demand, then they are to be delivered at the place where they are at the time of the sale, such as the store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer at which they are depos-

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ited or kept. And the reason is that the party to receive is to be the first actor by going to demand the articles, and until then the other party is not in default by omitting to tender them. But the reverse of this is the case, where, though the place is not fixed, the time on or before which the vendor binds himself to deliver the articles is stipulated in the contract, for then the party to deliver must become the first actor in order to fulfil his contract. It is said he must seek out the vendee at his residence, or place of business, and there tender the articles, to save himself from default. If the articles are cumbersome and inconvenient to transport, he must seek the vendee a reasonable time before the day of delivering, and ask him to appoint a place of delivery. (*Barr v. Meyer*, 3 Watts & Sarg. 295; *Goodwin v. Holdbrook*, 4 Wend. 380; *Currier v. Currier*, 2 N. H. 75; *Brownson v. Gleason*, 7 Barb. 472.)

It only remains, then, to see whether by the terms of this contract the place of delivery was fixed. If it was, both parties were bound by it; if it was not, then the defendant had the right to fix it according to the above rule. The contract calls for the city of Hannibal as the place of delivery, and that is a limitation on the parties as far as it goes. Neither party could go outside the city of Hannibal to fix a place of delivery; but still a wide margin is left for fixing the place of delivery. And is not this a mere limitation upon the party who has the legal right to fix the place of delivery, that he shall not go outside the city of Hannibal in fixing that place? This is the only view we can take of it. The very fact that the parties are now contending about the place of delivery, shows that no place was definitely fixed for the delivery of the hogs; and, according to the rule above laid down, the defendant had the right to appoint the place.

The instructions, then, of the court below were correct, and the judgment is affirmed. The other judges concur.

Richmond's Adm'x v. Pogue.

RICHMOND'S ADM'X, Respondent, v. WARDLAW & POGUE; Appellants.

Practice—New Trial.—If the party against whom a verdict is found and judgment given fail to file his motion for a new trial within the four days prescribed by the statute (R. C. 1855, p. 1286, § 6), but subsequently files his motion, which is overruled, no writ of error will lie from the judgment overruling the motion.

Appeal from Hannibal Court of Common Pleas.

W. P. Harrison & E. B. Ewing for respondent.

S. S. Allen and Crane, for appellants.

WAGNER, Judge, delivered the opinion of the court.

The record in this case shows that the judgment was rendered in the Court of Common Pleas on the 9th day of December, 1863, and the motion for a new trial was not filed till the 16th day of the same month. The statute (R. C. p. 1286, § 6) provides that "all motions for new trials, and in arrest of judgment, shall be made within four days after the trial, if the term so long continue; and if not, then before the end of the term."

In *Williams v. Circuit Court* (5 Mo. 524), the Supreme Court says: "The sum of the whole matter under our laws, then, seems to be this; a party sleeps on his rights until the time allowed him by law to make his motion for a new trial expires; he can no longer claim to make his motion as a matter of right, but he may afterwards suggest to the court that substantial justice has not been done him, and the court may look into the matter or not. If they refuse to grant the party a new trial, no error will lie, because no law authorized him to make the motion after the four days expired; and this is a proper punishment for neglecting to assert his rights in due time." (5 Mo. 328; 8 *id.* 686.)

The appellants having no authority for making the motion at the time, cannot be heard in alleging anything against the decision of the court in overruling it.

The other judges concurring, the judgment is affirmed.

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Crane, for plaintiff in error, filed a motion for re-hearing, which was overruled.

Motion for re-hearing by Appellants.

The appellants now move the court to grant a re-hearing in this case, and for that purpose submit the following :

The court in deciding the case have confounded the practice of 1849 with the old system, which is now not in use. To the case of *Williams v. The Circuit Court* (5 Mo. 254) belongs the credit of suggesting the practice that under the old system gradually grew up, by which motions for new trials were made essential to preserve for review the errors of the court below. But that case was, after all, the expression of one judge only ; and has not been treated as of much weight beyond the parties themselves. The case was decided in 1838 ; and afterwards in 1841, in *Benoist v. Powell* (7 Mo. 224), the same doctrine was fully endorsed, and it was held that though the record shows that a new trial was asked and reasons therefor assigned, yet the appellant was not entitled to a review of the errors below, because the motion for a new trial was not preserved in the bill of exceptions. So again in 1845, in *Higgins v. Brun*, (9 Mo. 497,) the court said that the rule was reasonable and settled, and that when there is a judgment on a verdict, and no motion is made to set it aside and grant a new trial, this court will not disturb the judgment. (pp. 501, 502.) But this was the voice of two judges only, and *Napton, J.*, dissented. Then in 1847 the case of *Floersch v. The Bank* (10 Mo. 516) came up, and decided that such errors only as were excepted to in the motion for a new trial would be reviewed by this court, and that errors not made the ground of objection in the motion for a new trial would not be reviewed. Here, also, *Napton, J.*, dissented. In *Watson v. Pierce*, 11 Mo. 348, decided in 1848, the whole court seem to concur, that unless the bill of exceptions contains a motion for a new trial, this court will not disturb a judgment rendered upon a verdict. The same point was again decided in *Rhodes v. White* (11 Mo. 623), and the court say, "It has been repeatedly decided by this court that a motion for a new trial must be made, thereby affording the Circuit Court an opportunity, if an error has been committed by that court in the course of the trial, upon a more mature consideration, to correct the same by granting the party complaining a new trial."

This was the law of practice in the Supreme Court of Missouri until 1849, at which time it was overthrown, and a new and opposite rule has constantly prevailed until the decision of the case at bar has, if permitted to stand, effectually restored the old practice. And it may be safely asserted that the code of 1849, whose prevailing spirit has been said to decide all questions of law and fact without slavish adherence to forms, becomes ineffectual, if the errors which are made below, and preserved of record, cannot be reviewed without they are once more brought to the notice of this court; and not only brought to its notice, but brought by a motion for a new trial, and brought to its notice again for a new trial, filed *within four days after the trial of the case*. The statute itself, where it refers to motions for new trials, is mandatory on courts and directed against them, and not against parties. If the motion is made, the law says the court shall do so and so; but it does not say that unless the party makes such a motion, he shall be precluded from having the errors below (otherwise properly preserved) reviewed in the appellate court.

It is a mistaken view of the law to suppose that a motion for a new trial is necessary at all under the practice of 1849, (83 Mo. 288, 248,) or that a party who has made such a motion is concluded by its terms from afterwards objecting to the action of the court below, other and additional errors not mentioned in his motion for a new trial, but which are patent on the record. (15 Mo. 315, 320; 26 *id.* 580; 28 *id.* 486; 84 Mo. 348.)

The first case now at hand, and in which probably the new rule was begun, was *Fine v. Rodgers* (15 Mo. 315), which was decided in 1851. The decision there was, that the action of the court below, in giving or refusing instructions, will be examined by this court, although not made a ground of error on a motion for a new trial. The key to the whole matter is given by Gamble, J. In delivering the opinion, he says: "It may be assumed to be the pervading spirit of the code, to decide cases upon all questions of law and fact without any adherence to forms. The 6th section of the 19th article allows bills of exceptions to be taken to all opinions of the Circuit Courts, in the progress of trials, as heretofore. The exceptions thus taken are intended to bring these opinions and decisions before the court for revision, and we think it is most consistent with the design of the Legislature to give the parties the benefit of such review, without

requiring any motion for a new trial to be made." (p. 320.) All the other judges concurred; among whom was Scott, who had always concurred in the other rule under the old practice.

Afterwards, in 1858, in *Wagner v. Jacoby* (26 Mo. 530), which was when the appellant had objected to evidence on the trial, and exception taken and preserved in the bill of exceptions, but not made a point in the motion for a new trial, the court held that it was unnecessary. Judge Richardson, giving the opinion, said: "The defendant duly excepted at the time the evidence was admitted, but did not assign the error in his motion for a new trial, and the plaintiff has insisted that such omission precludes the defendant from relying on the exception in this court. Under the former system of practice, it was decided that exceptions taken during the progress of the trial were regarded as waived unless they were made the ground for a motion for a new trial (10 Mo. 515); but it was held in *Fine v. Rodgers* (15 Mo. 315), that the practice introduced by the act of 1849 required a different rule, and since then the old rule has been abandoned, and the practice established that the court will review for errors committed during the progress of a trial, if exceptions are taken and saved, although they may not have been brought to the attention of the court in a motion for a new trial." (p. 532.)

The same doctrine is announced in *Prince v. Cole* (28 Mo. 486). The doctrine thus begun and confirmed, has never met with a dissenting voice from the bench of this court. To the time we have now followed it, two full benches have concurred in it, consisting of five different judges; and it has since been decided in exact conformity thereto, by a new court, that a motion for a new trial is altogether unnecessary. This was the case of *Gray v. Heslep* (33 Mo. 238), decided in 1862, and, as the court will observe, was participated in by distinguished counsel, and the point brought directly before the court. In giving the opinion of the court, Bates, J., says: "The first point made is, that the appellant has, by failing to file a motion for a new trial, waived all objections taken at the trial. This was the practice before the passage of the act of 1849, but that act introduced a different practice. (15 Mo. 315; 26 Mo. 530; 28 Mo. 486.) The act of 1855 does not change that of 1849 in any particular which would authorize us to return to the old practice. (p. 243.)

Rackliffe v. Seal et al.

**JAMES RACKLIFFE, Plaintiff in Error, v. A. R. SEAL et al.,
Defendants in Error.**

Conveyance—Mortgage—Mistake.—A conveyance intended as a security for a debt will not be treated as a mortgage in a court of law, unless the land be conveyed to the creditor upon condition. A deed between A. and B. by which A. upon a consideration received from B. conveys to A. (himself) real estate, to be void upon payment of a debt due by A. to B., cannot be foreclosed as a mortgage in a court of law, although in a court of equity, upon proper allegations of mistake, the deed might be reformed and the equity of redemption foreclosed.

Error to Hannibal Court of Common Pleas.

S. S. Allen, for defendants in error.

I. The mistake on the face of the mortgage being clear, and the mortgage itself also showing beyond all doubt to whom the lot was intended to be conveyed, so that no one could be misled or deceived thereby, it was the manifest duty of the court below to disregard the mistake on the trial, and do substantial justice to the parties without delay. There is, therefore, no error in the court below in admitting the mortgage deed to be read in evidence. (1 & 2 Prest. on Abst. 62; 2 Prest. on Conv. 432-33 & 35; 3 & 4 Green's Crui. 308; 2 Vent. 141; Coles v. Hume, 5 East's, 115; 4 Adol. & El. 228; 23 Mo. 146; 15 Mo. 61; 1 John. Ch. 140; 2 Wash. on Real Prop. 566, §§ 28-31.)

E. B. Ewing and Harrison, for plaintiff in error.

I. The defendant Ogle was a proper party. He was a subsequent encumbrancer; he had an interest in the mortgage property. (2 R. C. 1855, "Mortgage," §§ 6 & 7.)

II. The paper read in evidence by the plaintiff's counsel was not a deed to the plaintiff; there was no grant to him.

III. This was a proceeding to foreclose a mortgage under the statute, and is a proceeding at law, and is not governed by the rules of proceedings in equity. (Thayer v. Campbell, 9 Mo. 280.)

Rackliffe v. Seal et al.

If there was a mistake in the mortgage read in evidence by plaintiff, it could only be corrected upon such averments and such a state of facts as would have entitled him to relief under the old form of proceedings. The code (although it has abolished distinctions between legal and equitable actions) does not dispense with this. (*Maguire v. Vice*, 20 Mo. 481.)

LOVELACE, Judge, delivered the opinion of the court.

This is an action to foreclose a mortgage. The plaintiff alleges that the mortgage was executed by A. R. Seal and wife to James Rackliffe. The mortgage deed begins by stating that it is made "by and between Amer R. Seal and Elizabeth J., his wife, of the first part, and James Rackliffe, of the second part; and after acknowledging the receipt of the consideration, it proceeds to grant, bargain and sell to the said *Seal*, his heirs and assigns, and the *habendum* is to have and hold, &c., to the said *Seal*, &c. The conditions then go on to recite certain notes due by Seal to Rackliffe, and says that the deed was intended to secure the payment of these notes, and provides that it shall become void upon the payment of the notes, but otherwise to remain in full force.

The defendant Ogle comes in and asked to be made a party defendant, setting up a deed of trust executed by Seal to himself for the same land described in the plaintiff's mortgage, and subsequent in date to the plaintiff's mortgage, and also denying the validity of the plaintiff's mortgage. The court below found for the plaintiff, and the case comes here by error.

The principal question presented to this court is, whether the instrument of writing relied on by the plaintiff had the effect to vest the title to the real estate therein described in the plaintiff for the purpose of securing his debt. If this was a mere matter of construction, where the real intention of the parties is to govern, it would seem that the court below was correct; for it seems very plain that the intention

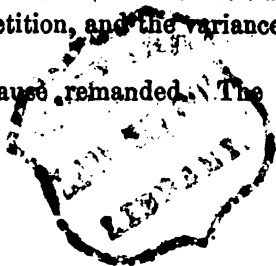
Rackliffe v. Seal et al.

of the parties was, that the legal title to the real estate in question should be vested in the plaintiff, for the purpose of securing the payment of his debt. But an instrument can only be construed where the language will admit of construction. Thus, to accommodate the evident intention of the parties, words will be construed with an unusual extent of meaning, and held to be *generic* rather than *specific*; as, for instance, men will be interpreted to mean mankind, and include women. (2 Pars. on Cont. 496.)

But a distinction is taken between construing a contract that admits of construction and correcting a mistake. Courts of law will construe a contract and give it that meaning which the parties intended it should have; provided such a construction can be put upon the contract without doing violence to the language used in the contract. But courts of law cannot correct the mistakes of the parties; as, for instance, in the case at bar, where they intended to use one word and used another. In such cases courts of equity, upon a bill filed for that purpose, will correct the mistake, and afterwards the instrument so corrected will be regarded as the contract made by the parties.

This perhaps might be done, and a decree had to sell the defendant's equity of redemption in the real estate in the same bill under our practice. But it would certainly require allegations as to the mistake, and a prayer to have the contract reformed, and the court ought to decree the correction before the judgment of foreclosure is allowed. This not having been done, the mortgage was improperly read in evidence against the objections of the defendant. It was not the instrument set out in the petition, and the variance was fatal.

The case is reversed and cause remanded. The other judges concur.



Lacey, Trustee, v. Giboney.

**A. T. LACEY, TRUSTEE OF J. R. WATHEN, Respondent, v.
ANDREW GIBONEY, Appellant.**

1. *Mortgage—Deed of Trust—Title.*—After the maturity of the debt secured by a mortgage or deed of trust of personal property, the mortgagee or trustee has the legal title and the right to recover possession. Although the trustee may have advertised and sold the property, he may sue for the possession, so that he may deliver the property sold to the purchaser.
2. *Fixtures.*—As between vendor and vendee, machinery does not pass with the freehold; and as between landlord and tenant, the tenant may remove any improvement he may make, before he surrenders the premises, provided it can be removed without injury to the freehold.

Appeal from Cape Girardeau Circuit Court.

Krum & Decker, for appellant.

Glover & Shepley, for respondent.

I. The action was rightly brought in the name of the plaintiff, and the evidence supported the claim of ownership. The attempted sale, when no money passed, no memorandum of sale was given, and no delivery of property, and when the conditions of sale were not complied with, passed no title out of Lacey.

II. The machinery being placed in and upon said premises leased by the tenant, can be removed by him and are not fixtures; for, 1. Any construction put up by the tenant for manufacturing purposes, no matter how securely it may have been united to the freehold, can be removed by the tenant. This is the case of a building constructed for that purpose. (*Powell v. McAshan*, 28 Mo. 70.) And even in the case of grantor and grantee, articles attached to the freehold more strongly than the machinery, were held not to be fixtures. (*Hunt v. Mullanphy*, 1 Mo. 508.) 2. But in this case it is not necessary to go to any such extent; the case here bringing it clearly within that class about which the decisions have for years been clear and uniform. The machinery bin was simply bolted down to timbers, and could

Lacey, Trustee, v. Giboney.

be removed without injury to the freehold. (*Turner v. Johnson*, 7 Mo. 43; *Finney v. Watkins*, 18 Mo. 209.)

LOVELACE, Judge, delivered the opinion of the court.

This was an action commenced in the Circuit Court of Cape Girardeau county, to recover specific personal property consisting of a steam engine, boiler and machinery necessary for running a chair factory, and also a corn mill, with its machinery attached to said engine. The petition of the plaintiff sets out that he is the owner and entitled to the possession of the property in question, which he alleges is of the value of seventeen hundred dollars; and that the defendant wrongfully withholds and detains the same from the plaintiff to his damage, &c.

The answer of the defendant denies that the plaintiff is the owner of the property, or entitled to the possession thereof, or that he wrongfully detains the same from the plaintiff, and denies damages, &c.

On the trial the plaintiff, to support his case, offered in evidence a deed of trust in the nature of a mortgage from one John M. Cleely, to secure the payment of certain liabilities which Cleely owed to Ignatius R. Wathen. Some of these liabilities consisted of notes which Cleely had executed with Wathen as security. It was an ordinary deed of trust to secure the payment of money; providing the manner in which the trustee should proceed to sell the property in case default was made in the payment of the money intended to be secured. But as no question arises upon the construction of the deed, it is unnecessary to set out its provisions more particularly.

The plaintiff also introduced evidence showing that he had attempted to sell the property under the deed, and that the sale was forbidden by the agent of the defendant; and although the sale continued, and the property was bid off by various persons, it does not appear that the property was ever delivered or any money paid. The plaintiff also proved that the property was owned by Cleely at the time of exe-

cuting the deed, and that it was used by him in carrying on a chair factory; that he had it put up in a house which he had leased from the defendant; that Cleely held the possession of the house of defendant under his lease, and the property in dispute, until about the time or a short time before the attempted sale by the trustee, about which time, at the request of the agent of defendant, he had given up the key of the house in which the machinery was kept to said agents. The case was submitted to the court, sitting as a jury, and a judgment rendered for the plaintiff, to reverse which an appeal is taken to this court.

I. It is difficult for the record, in this case, to tell exactly what specific ruling of the court below is complained of. It is contended here, however, that the plaintiff failed to show any title in himself, or any right to the possession of the property sued for. The parties, however, have not taken the trouble to point out to the court exactly what this defect consists in. They do say something about there being no forfeiture in the deed of trust. But the deed itself sufficiently proves a forfeiture; for several of the notes secured by the deed were payable to Wathen, the *cestui que trust* in the deed, and were past due. And in *Walcop v. McKinney's heirs* (10 Mo. 229) it was held that a mortgagee of real estate, after the day of payment stipulated in the mortgage deed, became the legal owner of the mortgaged property, and might maintain ejectment. And in *Robison v. Campbell* (8 Mo. 365, 615) it was held that the mortgagee of personal property, after the day of payment had passed, became the absolute owner of the property; and these decisions were made against the mortgagor or persons claiming under him. The rule is, that a mortgage is forfeited and the legal title vests in the mortgagee so soon as default is made in the payment of the money intended to be secured by it. In this case the plaintiff was interposed by the deed itself, for the purpose of holding the title to the property, and disposing of it for the payment of the debt intended to be secured by it; and that debt was then due, and he clearly had the

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right under his deed to take the property into possession so that he might give possession to those to whom he might sell.

II. And this brings us to consider the second reason hinted at by the defendant why the plaintiff had no title; that he had parted with it at the sale above referred to. It is the duty of an agent or trustee in a sale of this kind, not only to have the property bid off, but to deliver it to the purchasers, and the sale is not completed until the property is delivered; and if, from any cause, the person making the sale should be unable to deliver the property and put the purchaser in possession, the act of bidding it off could not amount to a sale; and that seems to have been the case here. Though the property was bid off, it was never delivered, nor was any ever paid. But even if the sale was binding on the parties, and would operate to pass title to the property, still the trustee is the legal custodian, and is entitled to the possession of the property until he delivers it over to the proper owners, and, as a mere bailee holding it for the use of the legal owners, he might maintain an action for the possession against a mere stranger. (Sto. on Bailm. 422.) So, whether it were a sale or not, the trustee might maintain the action in his own name; for if it were not a sale, the trustee is still the legal owner and may maintain the action under the first averment in his petition; and if there was a sale, then he is still entitled to the possession as against a stranger, for the purpose of delivering the possession over to the purchasers, and might maintain the action under the second averment in the petition.

III. But some importance seems to be attached to the fact that the boiler was enclosed by a brick wall; that the engine was bolted to timbers planted in the ground, and that much of the machinery was fastened in some way to the ground or to the house. Unless the object of the defendant is to claim, by these circumstances, that this property is a part of the freehold and therefore belonged to him, we do not understand what figure they are to cut in this case; and if that is the object of this evidence, then it is without any author-

ity to support it; for the rule, even between vendor and vendee, where it is construed strongest in favor of the freehold, is, that machinery does not pass with the freehold (1 Wash. on Real Prop. 7); and as between landlord and tenant, the rule has generally been laid down in the late cases, that the tenant may remove any improvement he makes at any time before he surrenders up the premises, provided it can be removed without injury to the freehold. (1 Wash. on Real Prop. 6; Raymond v. White, 7 Cow. 319; Phillips v. Mullanphy, 1 Mo. 442; Powell v. McAshan, 28 Mo. 70.)

There was no valid objection to the plaintiff's title as made out in the court below; and this leaves but one other objection that the defendant presents to this court in a way in which it can be reviewed. One witness made some statements in regard to the lease from the defendant to Cleely, which lease it appeared was in writing. After the witness stated that the lease was in writing, the defendant objected to his testifying further concerning it, and the objection was overruled; but it does not appear that the witness did say anything further concerning it, and the defendant afterwards introduced the written lease himself. So it does not appear how any possible injury could have resulted to the defendant by this abstract ruling of the court.

The other judges concurring, the judgment is affirmed.

JOHN J. H. JONES, Plaintiff in Error, v. JAMES M. STEELE,
Defendant in Error.

1. *Practice—Infant.*—Where an infant sues without procuring the appointment of a "next friend," as required by the statute, the defendant may take advantage of the defect by demurrer or by answer; unless he do so the defect is waived, (R. C. 1855, p. 1231, § 10,) and the defendant cannot move in arrest of judgment. (R. C. 1855, p. 1255, § 19.)
2. *Practice—Amendment.*—After a judgment in favor of an infant plaintiff without the appointment of a "next friend," at the commencement of the suit, the court may upon his application appoint a next friend, and approve his bond, that the money recovered be secured to the infant.

Error to Louisiana Court of Common Pleas.

Dyer, for defendant in error.

Campbell & Hesser, for plaintiff in error.

Though it may be true that at the time of suit brought the plaintiff had not complied with the provisions of the statute, yet the defendant could not take advantage of the omission or defect by motion in arrest. The objection was not taken at the proper time and in the proper way. (*Woods et al. v. The State of Mo.*, 10 Mo. 698.) The defendant should have raised that issue by plea in abatement or answer, and that is the only way it could be done. (*Schermerhorn v. Jenkins*, 7 Johns. 373.) A defendant cannot move in arrest for anything which might have been pleaded in abatement. (2 Black. 1120.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff, who is a minor, brought his suit in the Louisiana Court of Common Pleas against the defendant, and obtained a verdict in his favor. In the caption of his petition he purported to sue by his next friend; the defendant filed his answer to the merits, and went to trial. After the rendition of the verdict by the jury, the defendant moved the court to arrest the judgment, because no next friend had been appointed for the plaintiff by the clerk or court, as required by statute. The plaintiff then presented his petition to the court, praying the appointment of a next friend (the same person who purported to act as such in the caption of the petition) accompanied with the written acceptance and bond of the proposed next friend.

The court overruled the application and declined to make the appointment, and then arrested the judgment.

The first error assigned in this cause is the action of the court in sustaining the motion in arrest of judgment, and the second is refusing the application of plaintiff to have a next friend appointed. The defect in the petition was ap-

parent upon its face; the caption forms no part of it. To have made it regular, there should have been a substantive averment or allegation that an appointment of next friend was duly made in the mode pointed out by law; and in the omission of such averment, the petition was demurable. The defendant also had his election to raise the objection by answer, if he saw fit to do so. But when he did not avail himself of his privilege, either by demurrer or answer, he is deemed by our statute to have waived all objections, excepting only the objection to the jurisdiction of the court over the subject matter, and that the petition does not state facts sufficient to constitute a cause of action. (2 R. C. 1855, p. 1231, § 10.)

Our law is very liberal in upholding proceedings in favor of infants where they derive a benefit therefrom. By the statute of Jeofails (R. C. 1855, p. 1255, § 19) it is enacted that "where a verdict shall have been rendered in any cause, the judgment thereon shall not be stayed," &c., by reason of "any party under twenty-one years of age having appeared by attorney, if the verdict or judgment be for him." The court should have appointed the next friend for the plaintiff when the application was made, and approved the bond, in order that her responsibility to the plaintiff for the money recovered in the suit might have been secured.

The judgment is reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace not sitting, having been of counsel.

• F. M. WOOD, Plaintiff in Error, v. S. L. HICKS, Defendant in Error.

1. *Evidence—Hearsay.*—The statements made by one who is himself a competent witness are not admissible in evidence. The declarations made by one in possession of property, against his interest, are admissible in evidence against himself and those claiming under him.
2. *Fraud—Judgment.*—Judgment set aside as in fraud of creditors.

Error to Jefferson Circuit Court.

John L. Thomas, for plaintiff in error.

I. The court below should have omitted the declarations of A. H. Downing, because they were against his interest at the time they were made. (16 Mo. 250.) The case in 32 Mo. 464, is not in point.

J. A. Beal, for defendant in error.

I. The court properly ruled out the declarations of Downing because he was a competent witness, and no foundation had been laid to impeach his evidence by first asking him if he made a particular statement to Power, on a specified time and at a particular place. "Declarations of a maker of a deed attacked for fraud, are not evidence in favor of those who claim under the deed." (32 Mo. 464.)

II. Courts of equity have uniformly set aside deeds and judgments obtained by fraud, or where deeds and judgments have been had and obtained in bad faith, although for a valuable consideration. (Fonb. Eq. 642, n. & 470; 1 Sto. Eq. §§ 833, 353-54, 369.) This doctrine was laid down in *Twyne's case* (3 Co. 81), and it has ever since been steadily adhered to. Cases have been repeatedly decided in which persons have given full and fair prices for goods, and where possession has been actually delivered; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent. So where a man, knowing of a judgment and execution and with a view of defeating it, should purchase the debtor's goods, it would be void, because the purpose is iniquitous. (1 Sto. Eq. § 369; *Johnson v. Sullivan*, 23 Mo. 482; 12 Pick. 338, 392; 7 Johns. 182; 8 Dessaus. 323; 8 Phil. Ev. 854-5.) A creditor may combine with his debtors fraudulently to defraud his other creditors, and the conveyance is void, although the purchase is for a valuable consideration. (*Johnson v. Sullivan*, 23 Mo. 482; 35 Pa. 432; 12 Ind. 259; 8 Clark, Iowa, 543; 19 Texas, 257; 22

Texas,—; 29 Pa. 357; *Fairfield v. Baldwin*, 12 Pick. 388; B. C. 1855, p. 802, § 2.)

III. A confession of a judgment in favor of a *bona fide* creditor, given with the knowledge that another creditor is about to attach the property, is void as to the creditor. (*Ryan v. Daly*, 6 Cal. 238.) I maintain that the well settled principles of equity, from the case of *Twyne* to the present time, all uniformly lay down the doctrine, that a conveyance or judgment in favor of a person for a valuable and adequate consideration, if done in bad faith or in fraud of other creditors, is null and void because of the intent. (*Johnson v. Sullivan*, 23 Mo. 482; *Knox v. Hunt et al.*, 18 Mo. 180-81; 15 Mo. 378; 1 Bur. 474; 7 B. Mon. 369; 4 Ver. 412; 18 Mo. 180.)

LOVELACE, Judge, delivered the opinion of the court.

This was a petition to set aside a decree rendered in the Jefferson Circuit Court in favor of the defendant Hicks and against one Downing, decreeing title to certain real estate in said Hicks. The petition sets out that at the June term of the Jefferson Circuit Court, 1860, the plaintiff obtained judgment against said Downing for the sum of \$138 and 74 cts., upon which judgment an execution issued, and certain real estate which is described in the petition was levied on as the property of said Downing and sold to the plaintiff; that previous to the sale of the land to the plaintiff, as aforesaid, the defendant Hicks had commenced proceedings in the Jefferson Circuit Court against said Downing for the purpose of obtaining title to the land in question, claiming that said Downing had, by a verbal contract, agreed to sell the land to said Hicks, and that in pursuance of said contract said Hicks had taken possession of said land and made valuable improvements thereon, and paid the purchase money therefor. The petition charges that all the above allegations made in the petition of Hicks against Downing were false, and that the said Downing had filed an answer to said petition

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denying each and every one of said allegations; that, after the sale of said land under the plaintiff's execution, Hicks and Downing combined and confederated together for the purpose of defrauding the plaintiff out of the land, and to accomplish this it was agreed that Hicks should pay to Downing a certain sum of money claimed to be due upon the verbal sale, and that Downing should withdraw his answer filed in said cause and permit a decree to be entered against him for the land, and that in accordance with said agreement Downing did withdraw his answer and permit a decree to be entered against him without any evidence being offered to sustain the allegation in Hicks' petition. The petition also charges that Hicks had knowledge of the plaintiff's judgment and execution at the time said decree was rendered.

The answer admits the plaintiff's judgment and execution against Downing, and the sale of the land under the same, and the purchase by plaintiff; but denies all combination or fraud between the defendant and Downing for the purpose of defrauding the plaintiff, and insists upon the truth of all the allegations made by him in his petition against Downing.

Upon the trial, the court found the facts set forth in the petition to be true, and made a decree in favor of the plaintiff, setting aside the decree formerly rendered in favor of Hicks against Downing, and vesting the title to said land in the plaintiff, and ordering the plaintiff to pay to Hicks the sum of one hundred and eighty dollars. To reverse this decree, the defendant brings the cause to this court by writ of error. In the course of the trial, the defendant offered to prove the declarations of Downing in relation to the verbal sale by Downing to himself, which was rejected by the court, and that is urged as one ground for reversing the decree.

I am unable to see upon what legal ground the declaration of Downing could be admitted in this case. He was a competent witness, and could have been introduced by either

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party. Indeed, he was introduced by the plaintiff and examined on the very subject about which these declarations are said to relate. If he knew anything that would benefit the defendant, it was an easy matter to draw it out of him while he was on the stand; and if he refused to state the facts correctly by laying a proper foundation, the declarations in question might have been introduced by way of impeachment. But that is not the object in attempting to introduce them. The object was to prove a substantial fact, to wit: that the verbal sale of the real estate in question by Downing to Hicks, and the decree rendered thereon, were *bona fide*. It is certainly difficult to see how Downing's admissions, even if he were not a competent witness, could be used to effect Woods' rights. But we are told that the declarations sought to be proved were against Downing's interest at the time they were made. The rule is, that if a party in possession make declarations against his interest which would have been good against himself, they may be used against a person claiming under him. (*Jackson v. Bard*, 4 Johns. 280.) But the declarations to be good in such cases must have been made while the party was in actual possession, and in this case it is not shown that Downing was in possession at the time the declarations were made. Indeed, to admit that he was in possession, would destroy the whole theory of the defendant's case; for if possession did not pass with the verbal agreement to sell the land, there would be no shadow of title upon which the decree in favor of Hicks against Downing would be based.

We have examined the case of *McLaughlin v. McLaughlin* (16 Mo. 243) cited by the defendant in support of his position; but the cases are not similar. In that case the declarations of the intestate were admitted against the administrator; but in this case the declarations of a living witness are sought to be introduced against a party who had no common interest with him. In *Tucker v. Tucker* (82 Mo. 243) it was held that the declarations of the grantor in a deed made at the time of executing the deed, showing his

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intention in making the deed, were inadmissible in an action to set aside the deed for fraud. But the declarations of Downing, if they had been admitted and had proved the verbal contract contended for, they still would not have disproved or tended to disprove the fraud charged to have existed in the decree; for if there had been a verbal sale from Downing to Hicks, and Hicks had still owed a sum of money on that sale, Downing would have had an interest in the real estate that might have been levied on and sold under our statutes, and a decree passing title to Hicks by paying the balance due to Downing would be a fraud against Woods' rights; for he *had* a lien from the date of his judgment on all the interest which Downing had in the real estate in question. So it would seem that the declarations of Downing could have done the defendant no good even if they had been admitted. But there was no error in excluding them. He was a competent witness, and if the defendant desired to prove any facts that were within his knowledge, he should have introduced him.

It is also complained that the court below refused to admit the original petition and answer, in the case of Hicks v. Downing in evidence. We are not prepared to say that there was any error in this. The recitals in the pleadings in that suit certainly could not bind the plaintiff in this. Be that as it may, however, the pleadings make no issue with regard to what was tried in that case. The only question here was as to the fraud and collusion between Hicks and Downing.

It is unnecessary to review the propositions of law given and refused by the court. This was a case of chancery tried by the court, and the verdict seems to be for the right party, and it is therefore affirmed. The other judges concur.

**CITY OF HANNIBAL, Defendant in Error, v. HEIRS & ADM'R
OF ZACHARIAH G. DRAPER, Plaintiffs in Error.**

Dedication—Estoppel.—The dedication of land to public uses can be made only by the owner of the fee. The making and recording of a plat of a town, upon which plat certain portions of the land are marked as public, is a grant of such lands to public use, and all persons claiming by subsequent grant through the party thus filing such plat are estopped from denying the title of the public. But a party in possession of such lands, not thus claiming title, is not estopped from denying the title of the party filing the plat. (See S. C. 15 Mo. 634.)

Error to Pike Circuit Court.

This was an action of ejectment commenced in 1851, in Marion Circuit Court, to recover lots three and four in block twenty-six of the town of Hannibal, as originally laid out by Stephen Glascock. A trial was had in the Circuit Court, which resulted in the non-suit of the plaintiff under the ruling of the court. The case was brought into this court and the judgment reversed. (15 Mo. 634.) On the second trial, the plaintiff as evidence of title, introduced Glascock's plat of the town of Hannibal, filed in the recorder's office April 17, 1836. The lots in question are marked on the plat "church ground."

The defendants showed in evidence the following state of facts:

In 1841, the town of Hannibal, under its ordinance and by its assessor, assessed the lots in question for town taxes, as the property of an owner unknown. In 1843, the lots were sold by the town collector for these unpaid taxes to Hawkins & Gand, subject to redemption within two years. In the year 1841, the same lots were assessed for State and county taxes, and in 1843 were sold by the sheriff, and Z. G. Draper became the purchaser, and received a deed which was duly executed and recorded. In 1844, Draper redeemed the lots from the sale to Hawkins & Gand, and enclosed them with a fence. He and his heirs have been in possession ever since. In 1844, the lots were assessed to Draper for town

26	382
121	537
36	382
64	406
80	332
133	584

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taxes. In 1845, the City of Hannibal was incorporated and these lots were assessed to Draper for city taxes, and so on down to the commencement of this suit. In like manner, the lots were assessed to Draper for State and county taxes during the same time. These taxes were all regularly paid, and the tax receipts produced in evidence. In 1850, Glascock gave a quit-claim deed to Draper of his title to these lots. The consideration of the deed is \$100. It did not appear that the town or City of Hannibal ever took possession of said lots, or laid any claim to them up to the commencement of the present suit. The plaintiff, in reply, showed that the assessments for taxes of the lots for the year 1841 were by their numbers only, without further description, and in the name of "owners unknown."

The court below, on plaintiff's motion and under exceptions by defendants instructed the jury as follows:

1. The town plat filed in the recorder's office on the 17th day of April, 1836, by Stephen Glascock, with the explanations, marks and designations therein, had the effect when so filed to pass the fee simple to the lots three and four in block twenty-six from said Glascock, and to vest the same in the County of Marion for public use as church property, and by virtue of said plat said Stephen Glascock and all persons claiming under him are estopped from asserting any claim or right to said lots.

2. The act of the Legislature incorporating the City of Hannibal and approved February 21, 1845, had the effect to pass the legal title from the County of Marion to the corporation of the City of Hannibal, and since that act said city is and has been the legal owner of the lots in question in the same way as the county previously owned them, and since said act of incorporation said city has succeeded to all the rights and privileges of the county to the lots in controversy.

3. In order to make the assessment of the lots in controversy for the taxes for the year 1841 legal, it is *not* necessary that the assessor of Marion county should, in his tax book

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for that year, describe and designate particularly the lots in question, setting forth in said book, and in the copy of the same returned by him to the county court, the town in which the lots in controversy were situated, together with the street or alley on which said lots were situated, and the size of each of said lots in front and depth; and if the jury believe from the evidence that the lots were not so described by the assessor in his said book, then any sale of said lots made by the sheriff for the non-payment of the taxes for the year 1841 was and is utterly void, and the deed made by the sheriff of Marion county to the defendant passed no title to the defendant and is of no effect.

Defendants asked the following instructions, which were refused, and they excepted:

1. The plaintiff has not shown to the court any title or right of possession which will authorize the jury to find for plaintiff.

2. That if it shall appear from the evidence that the City of Hannibal did, in the year 1842, cause the lots in question to be assessed and taxed to non-resident owners, and did by her officers and in pursuance of her ordinances, in the year 1843, sell the same as the property of other persons, and that said city did, after said sale up to the date of defendant's deed from Glascock, continue to assess said lots to other persons as owners and receive the taxes thereon, then said plaintiff is estopped from setting her supposed title against said deed from Glascock, or those claiming under it, and in such case the jury should find for the defendants.

The jury rendered a verdict for the plaintiff. A motion for a new trial was made and overruled, and the defendants appealed.

R. M. Field, for appellants.

When this case was before this court on a former occasion, it was held that the plat of Hannibal, as filed in the recorder's office, was sufficient evidence of a dedication of the land in controversy on the part of the proprietor. It is a settled

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rule of law that an act of dedication to public use is incomplete without acceptance on the part of the public. The acceptance may be by formal act, or, as is more usual, by user and enjoyment. (Ang. Highw. § 132; 2 Greenl. Ev. § 662; *State v. Trask*, 6 Vt. 355; *Bissell v. Railroad Co.*, 26 Barb. 634; *State v. Carver*, 5 Strobb. 217; *Livaudais v. Municipality*, 16 La. 509; *David v. Municipality*, 14 La. An. 872; *People v. Beaubien*, 2 Dougs. Mich. 256.) And the levying and collecting of taxes is holden as strong proof against an alleged dedication. (*Irwin v. Dixon*, 9 How. U. S. 10.)

The present case is plainly distinguishable from that of *City v. Gorman* (29 Mo. 593). In that case the effort was made to obtain the admitted title of the city through the instrumentality of a tax sale not purporting to convey that title. Here the whole question is, whether the corporation ever had any title, and the tax deed is introduced, not as a source of title, but as one of the circumstances showing that the corporation never accepted the dedication.

Krum & Decker, for respondent.

I. The construction and effect of the "Act concerning towns and villages," approved February 20, 1835, and of the act incorporating the City of Hannibal, (Private Acts 1845, p. 126,) have been distinctly adjudicated by this court in this case. (*City of Hannibal v. Draper*, 15 Mo. 634.)

II. Glascock having made and recorded the plat, which had the effect to vest the fee of the lots in question in Marion county for public use, he and his assignees are estopped from reclaiming the property. The grant of Glascock to public use is not coupled with any condition or reservation. His plat, and the recording thereof, are in conformity with the statute and it operates upon his act, and thus his grant to the *public use* of the property in question is irrevocable.

HOLMES, Judge, delivered the opinion of the court.

It was decided when this case was here before (*City of*

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Hannibal v. Draper, 15 Mo. 684) that the town plat, acknowledged and filed or deposited with the recorder of the county of Marion, was effectual under the statute concerning plats of towns and villages (act of 20th February, 1835, R. C. 1835, p. 599) to convey in fee simple all the title of Stephen Glascock in and to the lots in question to the county of Marion, in hand, for the use of the inhabitants of the town of Hannibal as church ground, and that the act of incorporation of the City of Hannibal (act of February 21, 1845) vested all the title of the county of Marion in and to said lots in the City of Hannibal, for the same public use; and the proposition is not now controverted that the act of Glascock was sufficient evidence of a dedication on his part of the ground to the public use. But it is now insisted on the part of the defendant, that the dedication was incomplete until accepted by or on behalf of the town; that no evidence of acceptance was adduced by the plaintiff, but that, on the contrary, proof of its rejection had been shown by the defendant.

It does not appear that any evidence was produced on the part of the plaintiff to show either that the title to the land was in Stephen Glascock at the date of his plat, or that he had ever been in the actual possession of the lots or ground in controversy. On the part of the defendant, it was proved, that the lots in question had been vacant until 1843, when he took actual possession of them by enclosing them within a fence. It may be admitted that all the title of Glascock was vested in the county by virtue of the plat, and that he and all those holding under him afterwards were estopped from denying that fact, and that all the title of the county so derived was by virtue of the act of incorporation vested in the City of Hannibal. But this did not estop the defendant from standing on his prior actual possession; however acquired, it estopped him only from setting up title under his quit-claim deed from Glascock of a date subsequent to the plat. If the plaintiff had shown that Glascock owned the land in fee at the date of his plat, he might have stood upon

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the position that the title in fee was absolutely vested in the city in trust for the public use declared, without reference to the question whether there had been a dedication and acceptance of the ground for the public use, or not. Even in cases resting upon a dedication and acceptance alone, it must be shown that the dedication was made by the owner of the fee. (2 Greenl. Ev. § 663.)

On the other hand, it may be conceded that the tax title of the defendant under the city did not estop the plaintiff, for the reason that the city officers had no power to assess lots owned by the city itself, nor to sell the same for taxes, (*City v. Gorman*, 29 Mo. 593,) and that the defendant did not show a valid tax title to the ground in controversy. All this still leaves him standing upon an actual adverse possession prior in date to any actual possession shown by the plaintiff, in the city, or in those under whom she claims. On this state of the case, it is plain that no conveyance of title by Glascock, nor any dedication by him, or those holding under his plat, could be of any avail against the defendant Draper, unless the plaintiff had acquired the right to use the ground for public purposes, by virtue of such actual user, as would amount to an implied dedication and acceptance for the public use as against all persons whomsoever. In such case it is not necessary to prove who is the owner; nor does the right of the public rest upon grant by deed, but upon the use of the land, with the assent of the owner, whoever he is, for such a length of time, that the public accommodation and private rights might be materially affected by an interruption of the enjoyment. (2 Greenl. Ev. § 662.) The plaintiff gave no evidence of any such dedication and acceptance to the public use, and the evidence adduced on the part of the defendant certainly tended to show that there had been no such user as would amount to a dedication and acceptance of that kind. A dedication of this nature is a question of fact for the jury. (2 Greenl. Ev. § 662; *State v. Peark*, 6 Vt. 355; *People v. Baubien*, 2 Doug., Mich., 256.)

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The plaintiff seems to have proceeded on the theory that this plat, under the operation of the act in question, vested an absolute title, not only as against the person making and recording it, but as against all the world, and that such was the purport and effect of the decision heretofore made in this case. (15 Mo. 634.) We do not find anything in that decision to justify such a conclusion.

According to these views, the first instructions asked by the defendant should have been given.

We do not see any material objection to the instructions given for the plaintiff, in themselves considered.

The second instruction asked by the defendant was rightly refused, according to the decision in *City v. Gorman* (29 Mo. 593).

The other judges concurring, the judgment is reversed and the cause remanded.



JOHN BAKER, Plaintiff in Error, v. JOHN STONEBRAKER *et al.*,
ADM'RS OF JOHN S. STONEBRAKER, Defendants in Error.

1. *Judgment—Payment—Limitations.*—The lapse of a period of time of less than twenty years, with additional circumstances tending to prove payment of a judgment, may induce a presumption of payment, and authorize a jury to find the fact of payment; the presumption being stronger or weaker according to the length of time elapsed.
2. *Practice—New Trial.*—The Supreme Court will not disturb a verdict on the ground merely that it is against the weight of evidence, unless it can be seen that the preponderance is so great as to imply some gross partiality, or some prejudice or misconduct on the part of the jury.
3. *Conflict of Laws—Foreign Judgment—Limitations.*—Where the statute of limitations of the State in which a judgment is recovered operates to extinguish the contract or debt itself, the case no longer falls within the law of limitation of the remedy; and when such judgment is sued upon in another State, the *lex loci contractus*, and not the *lex fori*, is to govern.

Error to Montgomery Circuit Court.

E. A. Lewis, for plaintiff in error.

I. The court erred in admitting evidence as to John Stone-

36	338
98	373
36	338
100	117
36	338
45a	426
46a	208
36	338
51a	527
36	338
59a	340
36	338
128	129
36	338
156	521
36	338
168	596
36	338
168	69
36	338
94a	*425
36	338
102a	*265

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braker's business habits and character. Such testimony is never admissible in a civil case, unless the character or habits of the party are directly in issue. No exception is allowed to this rule in suits on contract, even where it might repel an imputation of fraud. (*Gough v. St. John*, 16 Wend. 646, 653; *Attorney General v. Bowman*, 2 Bos. & Pul. 532, note *a.*; 1 Greenl. on Ev. § 54; *Lander v. Seaver*, 32 Vt. 114, 124; *Jacobs v. Duke*, 1st ed. Smith, 271; *Church v. Drummond*, 7 Ind. 17; *Jeffries v. Harris*, 3 Hawks, 105; *Humphries v. Humphrey*, 7 Conn. 116; *Anderson v. Long*, 10 Serg. & R. 55; *Nash v. Gilkerson*, 5 *id.* 352.)

II. The evidence was calculated to mislead the jury. It is not only possible, but highly probable, that it constituted the real reason for their verdict. All the "circumstances" thus standing on an equal footing, or at least nearly so, it is impossible to tell which one operated effectually to produce the verdict. And in such cases the rule is universal, that if any one of such facts or circumstances was improperly submitted to the jury, the verdict must be set aside. (*Ellis v. Short*, 21 Pick. 142, 145; *Clark v. Vorce*, 19 Wend. 282; *Dresser v. Ainsworth*, 9 Barb., S. C. 625; *State v. Allen*, 1 Hawks, 6; *Anthorne v. Coit*, 2 Hall, 40.) And this ability to pay is not only denied any tendency to raise a presumption of payment, but has been held even to favor the contrary presumption, especially when taken in connection with the lapse of time; for the fact of the debtor's abundant means might constitute the very reason why the creditor had no fear of losing his debt, and hence forebore to sue. The defendant's willingness to pay, as deducible from his business habits, falls within the same category, besides being inadmissible from other considerations. Hence, all this testimony in the case fails to furnish any foundation for the instruction. (*Rogers v. Burnes*, 27 Penn. 525; *Hilton v. Scarborough*, 5 Gray, 422; *Fleming v. Rothwell*, 5 Har- ring, 46; 1 Phil. Ev., C. H. & E., 677.) The issuance or existence of the execution, whether returned or not, is, in the absence of a levy, entitled to no consideration, with

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reference to the presumption of payment; for, 1. There was in fact, no legal evidence of its existence—the mere historical statement certified by the clerk, without an exemplification of the execution itself, not being sufficient or admissible—(*Cornelison v. Browning*, 9 B. Monroe, 50; *Drake v. Merrill*, 2 Jones, Law, 368; *Barry v. Rhea*, 1 Overt. 345); and, 2. If it be claimed that there is sufficient proof of the loss of the execution to admit this secondary proof of its existence, then the very fact of its loss repels the presumption of payment as a legal conclusion. (*Peck v. Barney*, 12 Vt. 72; *Peck v. Tiffany*, 2 N. Y., Comst. 456; *Thomas v. Cleveland*, 33 Mo. 126; *Blackburn v. Jackson*, 26 Mo. 308; *Radde v. Whitney*, 4 E. D. Smith, 378.)

III. The court erred in overruling the motion for a new trial. The verdict was so palpably against the law and the weight of evidence as to justify the interference of the Supreme Court to correct the error. Every possible presumption of payment that could be extracted from the testimony was legally and conclusively repelled, leaving nothing to justify a verdict in favor of the party upon whom the burden of proof rested. (1 Phil. Ev. 677; *Woodbury v. Taylor*, 3 Jones, Law, 504; *Boardman v. DeForest*, 5 Conn. 1; *Dagget v. Tallman*, 8 Conn. 168.)

Dyer & Orrick, for defendants in error.

I. A shorter period of time than twenty years, together with additional circumstances tending to prove payment, may go to the jury and constitute a presumption of payment. (1 Phil. Ev. 677, and cases there cited; 2 McCord, Ch. 435; 2 Wash. C. C. 323; 3 McCord, 340-41; 1 *id.* 146-7; 8 Wend. 443; 7 Iowa, 224, 231; 9 Serg. & Ra. 379; 4 Wend. 483; 12 Vt. 72.)

II. The business character of John Stonebraker for accuracy or carelessness in his transactions, as disclosed by the testimony, was such a circumstance as might be considered by the jury with reference to the presumption of payment. (2 Grant's Cas. 77; 1 Greenl. Ev., § 39; 9 Watts, 442; 4

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Penn., Munf. 429; Ross v. Dailey, 1 Esp. 297; 20 Texas, 706; 2 Head, Tenn. 405; Fleming v. Rothwell, 5 Harr. 46, Del.; 1 Phil. Ev. 612.)

III. At most, the testimony was only irrelevant, and it is the uniform rule of superior courts not to reverse for irrelevancy of testimony unless it was calculated to mislead the jury. (29 Mo. 199; 3 Texas, 493.)

HOLMES, Judge, delivered the opinion of the court.

This suit, commenced in the St. Charles Circuit Court at the June term, 1859, and transferred by change of venue to the Montgomery Circuit Court, was founded upon a record of a judgment rendered upon confession in the county court of Washington county in the State of Maryland, on the third day of February, 1840, for \$1,230.75 debt, together with interest and costs, with a stay of execution for one year, in favor of George McCulloch against John Stonebraker; and it was afterwards assigned to John Baker, the plaintiff herein.

The answer set up the defence of payment. There was a trial by jury, and the defendant had a verdict. The plaintiff's motion for a new trial was overruled, and the case is brought up by writ of error.

It appeared in evidence on the part of the defendants, who had the affirmative of the issue, that, on the 26th day of February, 1841, an execution was sued out upon this judgment and placed in the hands of the sheriff, but that he never made any return thereof; that on the 20th day of April thereafter, John Stonebraker, the defendant, made an assignment of all his property, real and personal, amounting to some eighty thousand dollars, to trustees for the benefit of his creditors, "without priority or preference except as the same exists by law"; that in the fall of 1843 John Stonebraker came to Missouri and settled in the county of St. Charles, bringing with him some \$1,500 or \$2,000 worth of property, and that he was ever afterwards prosperous in business, was worth \$5,000 in 1849, had several farms and

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much valuable stock in 1855, of the value of \$10,000 at least, and died in 1859 at the age of seventy-two, leaving an estate worth \$25,000; that in respect of business habits and character he was rather "loose and reckless," was "very communicative" and did business with a rush," but that at any time after he came to this State he was well able to have paid this debt; and that the plaintiff's attorney in Maryland was a vigilant collector, and knew where Stonebraker resided in Missouri, and was acquainted with his circumstances and the fact that he had made a good deal of money.

On the part of the plaintiff, it appeared further that the suit had been conducted by an attorney resident at Hagerstown, in the county of Washington, State of Maryland, who had sued out the execution on this judgment and placed it in the hands of the sheriff of the county, but that he never saw it afterwards; that the trustees took charge of the property assigned and proceeded to settle up the business; that some time afterwards, the attorney made inquiry of one of the trustees, and was informed that there were sufficient claims having priority against the property assigned to exhaust the whole of the proceeds, and he did not suppose that anything would be paid on said execution; and the attorney states that no money was ever made on the same that came to his knowledge. He further stated that the sheriff had since died, and that he did not know what had become of the execution. The attorney in St. Charles testified that, after he had taken charge of the claim for collection, in 1859, he conferred with John Stonebraker on the subject, who denied that he was the man, and suggested that there was another man of that name in the State of Maryland, and that, afterwards, on being told what evidence had been obtained of his identity, he still denied that he was the man, but never intimated that he had paid the debt.

An extract from the bill of rights of the State of Maryland, showing that the people of that State were entitled to the benefit of the common law and the statutes of England

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existing at the time of their first emigration, and found applicable to their circumstances and to such other British statutes as had since been introduced, used and practised in the courts of law and equity, and to all acts of Assembly in force on the first day of June, 1774, except such as had expired or had been altered by subsequent legislation, was agreed to be considered as a part of the evidence.

The court gave the following instructions for the defendant:

"The jury are instructed that a less time than twenty years, together with additional circumstances tending to prove payment, may be considered by the jury as ground for a presumption of payment."

All the instructions asked for by the plaintiff were given; they were consistent with that for the defendant, were quite favorable to the plaintiff, and need not be further noticed.

An exception was taken by the plaintiff's counsel to the admission of testimony, tending to show what were the general business habits and character of the defendant; and the witnesses were allowed to state that he was in general "loose and reckless," doing business "with a rush." The rule is well settled, as insisted on the part of the plaintiff, that in civil cases, where the character of the party for honesty and integrity is not put in issue by the pleadings, evidence bearing upon reputation and character of that kind is inadmissible; but such was not the nature or the object of this testimony. It concerned only the business habits of the party as one circumstance, with all the rest, which, as tending to show his general mode of doing business, might have a bearing upon the question of payment, which was the subject of inquiry. The admission of irrelevant testimony may sometimes be a ground of error, where it can be seen to have influenced the minds of the jury unfavorably to the party objecting; but even if this testimony could be considered as irrelevant, or immaterial, we do not see any good reason to suppose it may have been prejudicial to the plaintiff. The habit and mode of dealing of the parties with

one another have been held to be a proper subject of inquiry in these cases. To some extent, the general business habit and character of the defendant, as a careful and punctual, or a loose and reckless man, in his business affairs, might be said to have a bearing, though remote, upon the presumption of payment. We are not required to say it would be sufficient in itself, nor can we say it was wholly irrelevant, taken in connection with the other circumstances of the case, or that it was improperly allowed to go to the jury for what it was worth. We are rather inclined to think it made more in the plaintiff's favor than against him. The jury were to draw their conclusion from all such facts and circumstances as might constitute a fair ground of inference as to the main fact under investigation, according to the ordinary course of human reasoning and the common experience of mankind of the natural and moral relations and connections of things. We cannot say there was any such error in this ruling as would justify us in reversing the judgment on this ground alone.

The instruction which was given for the defendants correctly laid down the general rule of law on the subject. A presumption of payment, as matter of fact, may arise from a great lapse of time, falling short of the full period prescribed by statute as a ground for a conclusive or a disputable presumption of law, taken together with other additional circumstances tending to show payment, as furnishing circumstantial and presumptive evidence and a basis of fact proved, from which a jury may be warranted in inferring the fact of payment. (*Winstanly v. Savage*, 2 McCord, ch. 435; *Goldbank v. Duane*, 2 Wash. C. C. 323; *Blake v. Ouart*, 3 McCord, 340; *Ross v. Dailey*, 4 Munf. 428; *Thompson v. Thompson*, 2 Head, Tenn. 405; 1 Greenl. Ev., § 39; 2 *id.* § 328; 1 Phil. Ev. 677 & note.) It is well settled also, that when there is some evidence of this character which is competent to go to the jury, it is a question of fact for the jury to decide. (*Fleming v. Rothwell*, 5 Harr. 46.)

The only question that remains is whether the evidence in

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this case was sufficient in law to sustain the verdict. There were some circumstances which certainly tended to show payment, and there were some which had an opposite tendency. But where the evidence is conflicting, it is the peculiar province of the jury to weigh all the facts and circumstances together; and it has been often held, that the court will not disturb a verdict on the ground merely that it is against the weight of evidence, unless it can be seen that the preponderance is so great as to imply some gross partiality, or some prejudice or misconduct on the part of the jury. We cannot say that such has been the case here. Again, where there is some evidence before the jury which bears upon the issue, and covers the whole issue, it is a matter for the jury to determine, and the court will not interfere, except in very extraordinary cases; but where it can be said that there is no evidence on which the jury could be authorized upon any rational principles, or according to the ordinary course of human reasoning and experience, to infer the fact in issue, a new trial will be granted. We cannot say that this is such a case.

At the date when the execution was issued on this judgment, it appears that the defendant Stonebraker had some eighty thousand dollars' worth of property, real and personal. It is true that, about two months afterwards, he made an assignment of all his property for the benefit of his creditors, whence it might be inferred that at the date of the execution he was already in failing circumstances; but it still remains true that, at that date, he was the owner of a large amount of real and personal estate. It is a part of the evidence, that the common law of England prevailed in Maryland, and by that law an execution was a lien upon personal property and bound the defendant's goods from date of the *teste* against any subsequent sale or assignment. (2 Tidd's Pr. 1000 & *n. A.*) It does not appear that the sheriff made an actual levy, but his duty required him to do so, and if the debt were lost by reason of his failure to make a levy when it might have been done, he would be held liable for the

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debt. He never made any return of this execution, and such failure of duty might render him personally responsible. It was argued that the certificate of the clerk was not evidence of this fact, but the body of the record shows that the execution was issued, and also that it had never been returned. This appears as an entry attested by the clerk; and the whole is then certified by the clerk, in the usual form, as a true copy of the record as the same remains in his office. It is thus made to appear as a part of the record itself. It appears also that the attorney of the plaintiff, who caused the execution to be issued at some indefinite time afterwards, made inquiry of one of the assignees, and was informed that there were other claims, having priority, sufficient to exhaust the funds, and he did not think there would be anything to satisfy this debt, and the attorney stated further that there was never any payment of this debt that came to his knowledge. These statements were entitled to very little weight. As to the assignee, it was mere hearsay, at best; he was himself a competent witness, and should have been called. The statement of the attorney amounted to nothing; for the debt may have been paid or compromised, and settled in some way without his knowledge. Here, then, was an execution issued and placed in the hands of the sheriff, which was a lien upon property apparently sufficient to have paid it, and on which no return was ever made by the sheriff. Nor does it appear that the sheriff was ever called upon to account for it, though the plaintiff and his attorney continued to reside in the State during all this long period of nineteen years and four months; at the same time, the defendant, though possibly insolvent while yet in Maryland, from the time of his coming to Missouri in 1843, had been at all times possessed of visible property real and personal, and amply able to have paid this debt if it had ever been demanded of him; and this fact must have been known to the plaintiff and his attorney in Maryland, yet no attempt is made to collect this judgment during this long period. We cannot but think that these were very strong circum-

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stances, and entirely competent to go to the jury, in addition to the great lapse of time, from which they might be warranted in inferring that this judgment had been, in some way, settled and paid. It must be borne in mind that but very slight additional evidence could be necessary in this case. In eight months more, there would have been a payment by presumption of law, under the statute of this State, disputable only by proof of payment, or of some written acknowledgment of indebtedness, made within twenty years, of some part of the judgment debt, but conclusive otherwise. (R. C. 1855, p. 1053, § 16.) The presumption here had not quite become a presumption of law under the statute; it was still a presumption of fact only, arising from great lapse of time and the other facts and circumstances proved as circumstantial and presumptive evidence. (Best on Presumption, 12.) It is a new argument addressed to the minds of the jury, and need be only such as might, according to ordinary reasoning and the common course of human experience, operate a belief or moral conviction in their minds of the truth of the hypothesis. (1 Greenl. Ev., § 44.) The conclusion was to be drawn by the same process of reasoning as that which prevails in the ordinary affairs of life, from all the connection and relations of the facts proved, in ascertaining one fact from the existence of others, without the aid of any rule of law; and it fell within the exclusive province of the jury, who were only bound to find according to their conviction of the truth. (1 Greenl. Ev., § 48.) And where, as in this case, the time required for a conclusive presumption of law had nearly elapsed, very slight additional circumstances must be considered as sufficient to produce such conviction; for as the lapse of time is of greater or less extent, so will a greater or less force and weight of the evidence be required. (Henderson v. Lewis, 9 Serg. & Ra. 379.) The effect of lapse of time alone will be in proportion to the number of years elapsed, and the force of other circumstances that may be necessary must be measured on a diminishing scale; and as the full period

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approaches, a proportionably less weight of additional evidence must be taken as sufficient. (King v. Cotter, 2 Grant's Cas. 77.) The jury have said that the facts and circumstances laid before them, after having been balanced and weighed in their judgment, have produced a moral conviction in their minds of the truth of the presumption, and turned the scale in favor of the defendants. We cannot say they have not judged aright.

It was urged that the fact of insolvency, the absence of the defendant from the State of Maryland, and some other circumstances, ought to be held sufficient to rebut the presumption of payment. It may be admitted that these facts had this tending, but still it was the province of the jury to weigh and decide. The defendant did not become actually insolvent until two months after the execution was issued, and if he were wholly insolvent afterwards, it could have been for a short time only; for it was fully proved that at any time after the fall of 1843 he was able to have paid this debt. In Dagget v. Tallman, (8 Conn. 168,) where the lapse of twenty years raised a *prima facie* presumption of payment, such presumption was held to be sufficiently rebutted by proof of continued insolvency and absence out of the State together. Here, the defendant was absent from the State, but the other and more important element of continued insolvency did not exist; and the fact that it was known where the defendant resided, and that he was not insolvent but possessed of ample property, might fairly be considered as in some measure rebutting or counter-balancing the contrary tendency of the mere fact of absence from the State. There were some other minor circumstances which might be considered as tending in opposite ways; but in view of the strong tending of the leading facts to strengthen the inference that might be drawn from the lapse of time by itself, we think this case is clearly distinguishable from that of Dagget v. Tallman, and some other like cases which were cited on behalf of the plaintiff, and that, on the whole, the additional circumstances proved brought the case sufficiently

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within the rule of law laid down in the instruction. Nor can we say that the verdict was without evidence to sustain it, nor that it was against the weight of evidence.

There is still another ground which, upon the evidence contained in the record, may fairly be taken in aid of the judgment which has been rendered. The extract from the Maryland bill of rights shows that the people of that State were entitled to the benefit of the common law and the act of Assembly in force in June, 1774, among which was the statute of 1715, prescribing the limitation of actions and a period for a conclusive presumption of payment of judgment. It provided (1 Dorsett's Stat. of Md., p. 11, § 6) that no bill, bond, judgment, &c., of above twelve years' standing, should be "good and pleadable, or admitted in evidence," saving only a further space of five years to persons under certain disabilities or "beyond the sea." In the case of *Carroll v. Waring* (3 Gill & J. 491), decided in 1882, this act was held to be a positive and peremptory bar, so that not even an express acknowledgment of the debt would revive the remedy upon it, and the statute and the decision upon it are cited by Greenleaf as an instance of a conclusive presumption of payment as matter of law. (1 Greenl. Ev., § 39 & note 21.) The doctrine is well established, that where an act of this kind operated to extinguish the contract or debt itself, the case no longer falls within the law of limitations on the remedy merely. In such case, when the debt or judgment is sued on in another State, the *lex loci contractus*, and not the *lex fori*, is to govern. (Sto. Conf. of Laws, § 582; *Huber v. Steiner*, 2 Bing. N. C. 202.) These authorities admit a qualification, that "the parties are within the jurisdiction during all the period of the statute, so that it has actually operated on the case." This qualification is to be understood of cases where the statute itself expressly makes exceptions of the absence of the parties beyond the jurisdiction, in which case it would not operate on them. But where, as in this case, the statute makes no exception of the absent party, but is absolute in its terms,

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this qualification is inapplicable. (1 Smith's Lead. Cas. 368.) Here the exception was only of the persons owning the judgment, and it appears that they did not come within the saving clause. The statute then operated upon this plaintiff and his judgment, and declared the debt conclusively barred, paid, and extinguished, after the lapse of twelve years. It goes to the existence and validity of the contract or debt itself—*ad valorem contractus*—and not merely to the remedy. When, therefore, this judgment was certified from the State of Maryland and sued on in this State, it stood there, by the law of Maryland, absolutely paid and extinguished.

The judgment was dead. How, then, can we be called on here to give it life and force again? The effect of the act of Congress of the 26th of May, 1790, requiring "full faith and credit" to be given to record of judgments from other States, is limited to the means of proof, and merely makes it evidence; but it does not extend to the effect and operation of what is so proved. This operation can only be such as is given to it in the State from which it comes. (Sto. Conf., § 1313; 2 Amer. Lead. Cas. 739-741.) The conclusion must be, that this judgment, having been paid by a conclusive presumption of law, and peremptorily extinguished in Maryland before it came to this State, cannot be allowed to have any greater force here than it had there, but must be considered here also as paid and extinguished.

Judgment affirmed. The other judges concur.

ALONZO A. EDERLIN, Respondent, v. JAMES JUDGE, Appellant.

Practice—Pleading—Joinder of Actions.—A cause of action founded upon a contract cannot be united in the same count with a cause of action founded upon an injury to property.

Appeal from the St. Charles Circuit Court.

E. A. Lewis, for appellant.

I. The court erred in overruling the demurrer and the

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motion in arrest of judgment. A claim for breach of contract cannot be joined with one for injuries to property. In this case, the two transactions are as much disconnected as would be an assault and battery committed by a landlord upon his tenant, from a breach of the terms of his lease.—R. C. 1855, p. 128, § 2, & p. 1231, § 6.

HOLMES, Judge, delivered the opinion of the court.

The petition united, in the same count, a cause of action founded on a contract under a lease, with a cause of action founded on an injury done to the property of the plaintiff. A demurrer for this cause was overruled, and there was a trial and verdict for the plaintiff. The defendant moved in arrest for the same cause, and the case came up by appeal.

The statute is express that such causes of action cannot be united in the same petition (R. C. 1855, p. 1228, § 2); and it is a good ground of demurrer (*ibid.* p. 1231, § 6).

Judgment reversed and cause remanded, with leave to file an amended petition.

Judge Wagner concurs; Judge Lovelace absent.

ABRAHAM KENNEDY, Respondent, v. NORTH MISSOURI RAILROAD COMPANY, Appellant.

1. *Railroads.—Damages.—Negligence.*—Negligence is the want of that care which men of common sense and common prudence ordinarily exercise in like employments. Railroad companies, owing to the dangerous character of the machinery and vehicles which they operate, will be held to the greatest caution and skill in the management of their business: but this will not exonerate others who are wanting in prudence or guilty of negligence.
2. *Practice.—Negligence.*—The question of negligence is one of fact to be submitted to the jury.
3. *Practice.—New Trial.—Excessive Damages.*—The Supreme Court will not grant a new trial upon the ground of excessive damages, unless it appears at first blush that the damages are flagrantly excessive, or that the jury have been influenced by passion, prejudice or partiality.
4. *Damages, exemplary.*—To authorize the giving of exemplary damages, malice, violence, oppression, or wanton recklessness, must be proven.
5. *Practice.—Instructions.*—Courts should not state propositions of law hypothetically to a jury, where there is no evidence in the case applicable to them.

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Appeal from St. Charles Circuit Court.

This suit was brought in the St. Charles Circuit Court in 1861, and was tried there upon an amended petition filed on the 18th of May, 1864, which stated that the defendant—a corporation chartered in 1851—built a railroad through Warren county, which passed over and through the plaintiff's farm, cutting off his residence from his water and timber, and that the defendant wilfully, maliciously and negligently failed to make the plaintiff a safe and good crossing over the railroad track; that the defendant offered to make a safe and good crossing above the tops of the cars, by putting a bridge over the track where there was a cut of sufficient depth for a bridge, and that defendant wilfully, maliciously and negligently failed and refused to build for plaintiff a crossing that could be crossed without great risk, particularly when coming from the north to the south side, as the cars could not be seen coming from the east until you are upon the track, the crossing being at the west end of a deep cut; that on the 22d day of October, 1860, while the plaintiff was coming from the north part of his land with his wagon and team, with three barrels of water and his daughter,—in crossing the track, his wagon and team, his daughter and himself, were struck by the train going west, the wagon broken, his daughter and both horses killed, and himself so bruised and crippled that he had to call a physician and expend a large sum of money to be cured: all which was caused and occasioned by the negligence and unskilfulness, criminal intent, carelessness and incompetency of the officers, agents, servants and employees of defendant whilst running and conducting and managing the locomotives, cars and trains of cars of defendant, and by reason of the failure of defendant, its agent and employees, to erect and maintain a proper and suitable farm-crossing across said railroad, whereby he was damaged in the sum of ten thousand dollars.

The answer admitted the construction of the railroad through the plaintiff's farm, as they had a lawful right to do

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(having acquired the right of way), but denied that they had failed to make the plaintiff a safe and good crossing for the use of his farm, and averred that they had made him a good and sufficient farm-crossing, at his request and at the place selected and designated by himself when the railroad was built, and that it was a good, adequate and sufficient farm-crossing, which could be used with safety and convenience by the exercise of ordinary care and prudence, and that the same had been used by the plaintiff from the year 1857 down to the time of the accident; it ignored the injury and required proof; and it denied that the accident and injury were caused or occasioned by any negligence, unskillfulness, criminal intent, carelessness or incompetency of any officer, agent or employee of the defendant whilst running, conducting or managing the trains, or by any failure on its part to build and maintain a suitable farm-crossing for plaintiff's use; and denied all damage in the premises.

The case shown by the evidence was nearly as follows:—About eight o'clock in the morning of the 22d of October, 1860, a passenger train was moving westwardly on time at the usual rate of speed (15 to 20 miles an hour), and was passing through a cut ten feet deep on a straight line of track with ascending grade, approaching a farm-crossing on the plaintiff's farm, the engineer, conductor and brakeman being all at their posts and on the alert. At the same time, the plaintiff and his daughter, a woman grown, in a wagon with three barrels of water and two horses, were approaching the crossing from the north side on a farm road leading from the spring to the house on the farm, while a hill or low ridge on his left intercepted his view of the track and coming train, and also the view from the train, until he should be within twenty feet of the crossing. He knew it was about time for the train to be passing, but, being in some hurry, thought he could get over before the train would come; and he drove right on without stopping to listen, or to get out of his wagon and look up and down the track, before venturing to drive over. When the train got within a quarter of a mile of the

next station (at Wright City) beyond the crossing, and while as yet more than 200 yards distant from the crossing, and before the horses and wagon came in sight of those on the train looking out through the cut, the fireman (as usual) had begun to ring the bell as a signal for the station, and the brakeman at the rear end of the train was looking out for the station, when he, the fireman, and the engineer, almost at the same instant, caught sight of the horses' heads coming into view within twenty feet of the track. The engineer instantly whistled the signal for "down brakes" and reversed his engine, and every possible effort was made to stop the train. The horses had got upon the crossing, and there stood immovable with terror. The plaintiff tried first to drive them over, and then to back them off, but could do neither; and they were immediately struck.

It was proved that the horses, worth some \$200, were killed, the wagon damaged to the amount of \$25, the plaintiff somewhat bruised, and the woman killed; and that the plaintiff, though he was able to attend the funeral of his daughter, was for some time unable to work as usual, and had paid a small sum for doctor's bill; but did not appear to have been seriously injured. The crossing was in a good state of repair, nor did it appear that the accident was attributable at all to any defect or difficulty with the crossing itself.

It also appeared that it was not the practice or custom, on this or other railroads, to give a signal by bell or whistle for a private farm-crossing, and none was given specially for this crossing, on this occasion, otherwise than as above stated.

It was in evidence that a person standing on or near to the crossing could see half a mile and more down the track in the direction in which the train was coming; that the crossing had been made where it was at the instance of the plaintiff himself in 1857, and that he had used it ever since; that, on the whole, it was the best location on the farm for a crossing, unless a bridge were to be built over the cut; that the defendant had long before offered to build a bridge if plaintiff would pay the expense, as was usual in such cases,

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and that he had refused; that the crossing was a safe and good one if used with ordinary care and prudence, and was built in the same manner as other farm-crossings; and several intelligent witnesses testified, that, under such circumstances and at such a time, they would, and they thought any man of ordinary care and prudence would, stop and listen, and get out and look up and down the track, before venturing to drive over.

It was in evidence that the defendant had acquired the right of way through this farm and made compensation to the plaintiff therefor.

Plaintiff offered evidence to show that there was a crossing of a public highway over the railroad a mile or more to the eastward of this farm-crossing, and that the employees on the train had not rung the signal bell for that public road-crossing—some witnesses, over a mile off at the time, stating that they had not heard the bell ring.

Plaintiff offered evidence to show that a bridge could have been built over the cut for a farm-crossing, and that such a crossing would have been safer.

The following instructions were given for the plaintiff, and the defendant excepted:

1. If the jury believe from the evidence that the plaintiff has sustained injuries to his person and property by reason of the negligence or unskilfulness of the officers or employees of defendant whilst running, conducting or managing any locomotive, car, or train of cars, on the railroad of defendant, then they will find for the plaintiff, and assess his damages at such sum as they consider sufficient to compensate him for such injuries, not exceeding ten thousand dollars.

2. If the jury find from the evidence that in the construction of defendant's railroad, and in the location and construction of the crossing at which the accident occurred, there was negligence or unskilfulness on the part of the officers, agents or employees of the railroad company, and that by reason of such negligence or unskilfulness the plaintiff, while using the crossing with his wagon, was unable to perceive the approach

of the train of cars in time to avoid being run over, and was immediately, in consequence thereof, struck by the locomotive and sustained injuries to his person or property, then the jury will find for the plaintiff and assess his damages accordingly, unless the jury also believe from the evidence that there was negligence on the part of the plaintiff.

3. In estimating the amount of care and circumspection which a party ought to exercise in order to avoid inflicting injury upon others, it is proper to take into consideration the nature and extent of the injury liable to be caused by the absence of such care and circumspection; and hence, from the known destructive effects of railroad collisions, the agents and officers of railroad companies are held to a greater degree of care and circumspection in running their trains than the drivers of ordinary vehicles on common roads; and if the jury believe from the evidence that owing to the location and construction of the crossing, and the topography of the adjacent localities, more than ordinary care ought to have been used by the persons in charge of the train in approaching that point, either by sounding a signal, by lessening the speed of the train, or by any other means calculated to avert a collision, and that no such special or extraordinary care was taken or means used on that occasion, then the jury are authorized to infer negligence on the part of the defendant, and the plaintiff is entitled to recover, unless the jury also believe from the evidence that there was negligence on the part of the plaintiff.

4. It is the duty of defendant to commence ringing the bell, or blowing the whistle, at a distance of eighty rods from the crossing of any public travelled road or highway, and to keep ringing the bell or sounding the whistle at intervals until the train has crossed such road or highway; and if it appears from the evidence that at the time of the accident no bell was rung or whistle blown, as above required, at or near the crossing of a public travelled road or highway in the vicinity of the scene of the catastrophe, and that if such bell had been rung, or whistle blown, a warning could have

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been conveyed in time to plaintiff, whereby the calamity and injury might have been averted, then these are facts from which the jury may infer negligence or unskillfulness in the officers, agents or employees of the railroad company in the running and managing of the train, and their verdict will be rendered accordingly.

5. It is the duty of the railroad company to erect and maintain proper and suitable farm-crossings for the use of owners of land adjoining the railroad, and if defendant failed to erect and maintain a proper and suitable farm-crossing for plaintiff, or did make a crossing where the calamity occurred, which was so located and constructed as to be hazardous and dangerous to persons crossing, and that but for the unskillful and dangerous manner in which the crossing was located and constructed the casualty might not have occurred, then these are facts which the jury are authorized to consider in determining the question of negligence or unskillfulness on the part of defendant which may render defendant liable on this action.

[See opinion for 6th instruction.]

Defendant asked the following instruction, which was refused, and an exception was taken :

1. The jury are instructed that the defendant was not bound by law to build anything more than the usual and ordinary farm-crossing on this farm ; that the defendant was not bound by law to build a bridge over the railroad, above the tops of the cars, for the accommodation of the plaintiff's farm, as a farm-crossing, and that there was no negligence on the part of the defendant in not having built such a bridge over the railroad on this farm.

The following instructions were given for the defendant :

1. The jury are instructed that they are to consider whether there was any negligence on the part of the plaintiff himself, or a want of care and common prudence such as men of common sense and common prudence ordinarily exercise on such occasions ; and if they believe from the evidence, in

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view of all the circumstances, that there was such negligence or want of care and common prudence on his part which produced, or contributed in part to produce, the accident and injury in this case, then the jury must find for the defendant, unless the jury believe from the evidence that there was a willingness on the part of the defendant to inflict the injury complained of.

2. Though the jury may believe there was some negligence on the part of the defendant, yet if they believe from the evidence that there was also negligence on the part of the plaintiff himself which produced or contributed to produce and occasion the accident and injury in this case, then they must find for the defendant, unless they are satisfied from the evidence that the defendant wilfully inflicted the injury complained of.

3. The jury are further instructed as to what is negligence in the plaintiff, that they are to consider and judge, from all the circumstances in the case, whether any man having charge of a team of horses who is about to cross a railroad at a crossing, on the same level with the track, where his view of the track and of a coming train is intercepted until he approaches very near to the crossing, is not in duty bound to stop and listen, and look in both directions, up and down the track, before he ventures to drive thereon; and if the jury believe from the evidence that the plaintiff failed to do so on this occasion, and that if he had done so he could have seen or heard the train coming in time to have avoided the accident, then they may find that there was negligence on his part; and if the jury find that there was any negligence, or want of care and common prudence, on his part, which produced or contributed to produce and occasion the accident and injury complained of, they will find for the defendant, unless the jury believe from the evidence that the defendant wilfully caused the injury complained of.

4. The jury are instructed that the provision of the statute of this State relating to signals by ringing the bell or sounding the steam whistle, therein required to be given by

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railroad trains on approaching road-crossings on the same level with the track, are intended to apply to open public roads or streets, and that they do not apply to nor include a mere private farm-crossing; and if the jury believe from the evidence that this was a private farm-crossing, and not an open public road or highway, then these stated signals were not required by law to be given on approaching this crossing and for the farm-crossing; and if the jury further believe from the evidence that the alarm bell or signal whistle for putting down brakes was sounded, and the engine reversed, as soon as the engineer or conductor saw the team of horses about to enter upon the track, then there was no negligence on the part of these officers in respect to the giving, even if they did not give, in fact, the alarm by bell or whistle at a distance of eighty rods or more from the crossing in question, or before the team was actually seen.

5. The jury are instructed that the plaintiff is not entitled to recover any damages in this case on account of the death of his daughter, or any injury done to her; and the jury will confine themselves wholly and exclusively to the consideration of the evidence relating to the injury done to the plaintiff himself, either in respect to his own person or his property.

6. If the jury believe from all the evidence that the injury done in this case was the result of accident or misadventure, without any culpable negligence in either party, they will find for the defendant.

Verdict was rendered for the plaintiff for \$2,000 damages.

Orrick and Carr, for appellant.

I. The instructions given for the plaintiff were erroneous.

The first—Because, 1. There was no such case stated in the petition, nor in issue, as that supposed by this instruction. The case stated in the petition was, that the defendant had failed to make for plaintiff's use a safe and good farm-crossing, and that, by reason of this failure, the plaintiff, in attempting to use the crossing that was made there, had suf-

ferred the injury complained of. It was added, it is true, in the conclusion of the petition, that the same injury was caused and occasioned by the negligence, unskilfulness, criminal intent, carelessness and incompetency of the officers, agents and employees of the defendant whilst running and conducting and managing the locomotives, cars and trains of cars of the defendant; but there is no statement of any case or any facts in the petition showing such negligence, &c., of officers, &c., in running, &c.; or if there be, then it is bad, on motion in arrest, for uniting two causes of action in one count.

2. There was no basis in the evidence for such an instruction.

The second—Because, 1. It was a departure from the petition and issue, there being no allegation in the petition that the defendant had been in fault in the construction of the railroad, but only that they had failed to make a safe and good farm-crossing.

2. It makes the defendant responsible for the topography of the country, and the fact that the plaintiff's view of the track was intercepted by an intervening ridge until he drew near to the crossing; and this, besides being a departure from the petition, was erroneous as an abstract proposition of law.

The third—Because, 1. It was a departure from the petition, there being no allegation of fact therein showing a case of negligence, &c., of the officers, &c., in running locomotives, cars and trains.

2. It was erroneous in assuming that the defendant was bound by law to sound a signal for the farm-crossing, or to lessen the speed of the train on account of the locality of the crossing and the topography of the country adjacent. The statute provision concerning signals and road-crossing (Charter Acts of Mar. 3, 1851, § 11; Laws of 1851, p. 488), and Jan. 7, 1852 (Laws of 1853, p. 323), and Railroad Act, § 25 (R. C. 1855, p. 423, §§ 47, 48, 57, & pp. 436-8), all relate to public roads or streets. In Redf. Railw. 172, § 80 (2), a "farm road" is not a "road," nor even a "private way."

The fourth—Because, 1. It relates to another and wholly

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different transaction not in issue, occurring (if it ever occurred at all), as it might be, "in the vicinity," miles away from the scene of the transaction stated in the petition. *Shaw v. Bos. & Wor. R. Co.* (8 Gray, 69-71), the inquiry must be confined to the very transaction stated in the petition.

2. It is argumentative on assumptions of remote facts and imaginary possibilities having no immediate connection with the transaction in question.

3. There was no basis in the evidence for such an instruction.

The fifth—Because, 1. It authorizes the jury to find the defendant guilty of negligence and unskilfulness, and liable in this action, if they believe this farm-crossing was hazardous and dangerous to persons crossing. Of course, all crossings are hazardous and dangerous to persons crossing, especially at an hour when a train coming on time is to pass.

The sixth—The court erred in giving this instruction, for it gave countenance to the idea with the jury that there was evidence before them on which they would be justified in law in finding that the injury done to plaintiff was wilful and reckless on the part of the defendant; which was not merely absurd, but tended to mislead the jury. (Sedg. Dam. p. 658; 16 Conn. 320; 6 Cow. 254; 7 Mass. 254; 5 Watts & Serg. 524; 1 Barr. 190-97; Sedg. Dam. p. 664.)

The appellant was a common carrier of passengers and property on the train, and as such was under a paramount obligation to transport the passengers and property with speed and safety; and, subject to this paramount obligation, it was under a secondary obligation to citizens along the line of its road to run its train so as not to injure them in person and property. This view of the case is entirely ignored by the instructions given by the court on motion of the respondent. (*Louisv. & Frankf. R.R. Co. v. Ballard*, 2 Met., Ky. 177.)

II. The instructions which were refused for defendant should have been given.

The Charter Acts of Mar. 8, 1851 (Laws of 1851, p. 488), and Jan. 7, 1853 (Laws of 1853, p. 323), did not require

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the company to build farm-crossings. The Railroad Act of Feb. 24, 1853, § 51, required railroad corporations formed under that act to erect and maintain farm-crossings for the use of owners of farms, and by § 56 all railroad corporations in the State were made "subject to all duties, liabilities and provisions (of said act) not inconsistent with the provisions of their charters"; and the same was re-enacted December 13, 1855. (R. C. 1855, pp. 437-8, §§ 52-7.)

The defendant was not bound by these statutes, nor by any law, to build an expensive bridge over a cut for the accommodation of this farm, when an ordinary farm-crossing could be built at other places on the farm which could be used with safety and convenience by the exercise of care and common prudence. (*Horne v. Atlantic R.R.*, 36 N. H. 440-8.)

III. The case being put before the jury in this manner for the plaintiff, the instructions which were given for the defendant were of no use to him.

IV. The verdict was against the instructions given for the defendant; for, on the whole evidence, it was a clear case of negligence on the part of the plaintiff himself, and that, too, negligence which not only contributed to produce the accident, but was the whole real cause and occasion of the accident.

Redf. Railw. 394, § 172, n. 4 & 5, plaintiff was bound to stop and listen, and to get out and look up and down the track. (*O'Brien v. Phil. & Wilm. R.R. Co.*, cited from 10 Am. Railw. Times, Nos. 10-13, not reported; *Shaw v. Boston & Worc. R.R. Co.*, 8 Gray, 66-8; Redf. Railw. 330, § 150 [1]; *id.* 394, § 172 [3]; *Railroad v. Norton*, 24 Penn. 465.) Where there is negligence on the part of the plaintiff himself, he cannot recover. (*Penn. R.R. Co. v. Ogier*, 35 Penn. 60; *Felden v. Railw. Co.*, 2 McMull., S. C., 403; *Herring v. Wilm. R. Co.*, 10 Ired. 402.) If negligence of plaintiff contributed to the accident, he cannot recover. (*Penn. R. Co. v. Henderson*, 43 Penn. 453; *Penn. R. Co. v. Zebe*, 33 Penn. 325; *Chicago & Rock Island R.R. Co. v. Stilt*, 19 Ills. 499.)

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E. A. Lewis and *W. A. Alexander*, for respondent.

I. As to the sixth instruction given for plaintiff, the evidence tended to show not only that the person running the train approached a hidden and exceeding dangerous crossing at a high rate of speed without sounding any signal, but that he also violated the law requiring him to sound a signal at a public road-crossing close by and just before reaching the scene of the catastrophe; it was, therefore, properly left to the jury to determine whether these omissions, aggravated as they were by the location of the crossing and the adjacent topography, did not manifest a carelessness of life and property amounting to recklessness. (*West v. Forrest*, 22 Mo. 344; *James v. Christy*, 18 Mo. 164; *Fairchild v. Cal. Stage Co.*, 13 Cal. 599; *Kountz v. Brown*, 16 B. Mon. 577; *Hopkins v. Alt. & St. L. R.R. Co.*, 36 Ills. 9; *Masters v. Warren*, 27 Conn. 293; *N. O., &c., R.R. Co. v. Hurst*, 36 Miss. 660; *Macon, &c., R.R. Co. v. Winn*, 26 Geo. 250.)

WAGNER, Judge, delivered the opinion of the court.

From the record in this case, it appears that the collision took place where the railroad crosses a private farm-crossing, on land belonging to respondent. From the peculiar topography of the country, and the location of appellant's track, it seems that the cars could not be observed by a person travelling in the direction in which the respondent was going, till they were immediately up to the crossing. The parties were each travelling their respective roads; each had a right to exercise this privilege, in a lawful manner, without hindrance or disturbance; and each was equally bound to use the same degree of caution, care and diligence to avoid collisions or accidents. If either party, by his negligence, contributed to the catastrophe, he must suffer the consequences, unless the other party was guilty of misconduct still more gross and culpable, and could have prevented it by the exercise of reasonable precaution.

Negligence is the want of that care which men of common sense and common prudence ordinarily exercise in like em-

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ployments. Railroad companies, owing to the dangerous character of the machinery and vehicles they operate, will be held to the use of the greatest caution and skill in the management of their business: but this extraordinary degree of care and skill required on their part will not exonerate others who have been wanting in prudence, or guilty of negligence. The question of negligence is one of fact, to be submitted to the jury under all the circumstances, and to be determined by them upon their view of what prudence and skill required. (Redf. Railw. 398; Macon & W. R.R. Co. v. Davis, 18 Geo. 679.)

In this case much evidence was introduced, and it was very contradictory in its character. Some of the instructions given for the respondent were objectionable; but we are of the opinion that their objectionable features were counteracted by those given for the appellant, and that all, taken together, presented the law fairly, with the exception which we shall presently notice.

The ground urged for a reversal, that the damages are too large, is not good here. There was evidence to go the jury, and where that is the case it is their peculiar province, under proper instructions from the court, to determine the amount. Before we are at liberty to interfere with a verdict, it must appear at first blush that the damages are flagrantly excessive, or that the jury have been influenced by passion, prejudice, or partiality. When there is any evidence to support the verdict, it will not be disturbed; but this court will interfere when there is no evidence, or when the court below gives an instruction which is not authorized by the evidence.

The court, in the sixth instruction given at the instance of the respondent, instructed the jury, that if they believed, from the evidence in the case, that the injury complained of was wilfully or recklessly done by the defendant, then they were not confined to the actual damages sustained by the plaintiff, but might give such exemplary damages as the circumstances of the case warranted.

To authorize the giving of exemplary or vindictive damages,

either malice, violence, oppression, or wanton recklessness, must mingle in the controversy and form one of the chief ingredients. The act complained of must partake something of a criminal or wanton nature, else the amount sought to be recovered will be confined to compensation; but compensation will be intended to amount to full satisfaction, and the jury must measure this as well as they can, taking into consideration the whole injury which was sustained, in all its parts—as suffering, bodily and mentally; loss of time, or of money, or of labor; and it will also include prospective losses and expenses.

And in case of collision, like the present, if it was brought about by the wantonness, recklessness, or gross negligence, of those in charge of the train, it is permissible to give exemplary damages; but for a mere casualty or collision, without wantonness, recklessness, or gross negligence, exemplary damages should not be awarded. (*Hawkins & Co. v. Riley*, 17 B. Mon. 101.) In this case there is no evidence whatever of either recklessness, wantonness, or gross negligence, on the part of those conducting the railroad train, and consequently nothing on which to predicate the instruction. The instruction asserts a correct abstract proposition of law, but there is no evidence to support it.

Courts should not state propositions of law hypothetically when there is no evidence in the case applicable to them. They are calculated to mislead the jury.

For the giving of this last instruction the judgment is reversed and the cause remanded. Judge Lovelace concurs; Judge Holmes, having been of counsel, did not sit.

STATE TO USE OF WOODWARD KEITHLY, Respondent, v. EDWARD GRUPE *et al.*, Appellants.

1. *Constable—Bond.*—The constable and his securities upon his official bond are liable for the constable's refusal to pay upon demand the amount collected by him upon notes or accounts given to him for collection without suit. (R. C. 1855, p. 348, § 13, & p. 988, § 121.) The giving of a receipt is not a condition precedent to his liability.

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2. *Practice—Demand.*—To avail himself of the want of a demand made previous to a suit, the defendant must set up the defence in his answer and tender the amount due. (R. C. 1855, p. 448, § 84.)

Appeal from St. Charles Circuit Court.

Wm. A. Alexander, for respondent.

Bruere, for appellants.

HOLMES, Judge, delivered the opinion of the court.

This appears to have been an action against a constable and his securities on his official bond, alleging, as a breach, that the plaintiff had placed certain notes in the hands of the constable for collection, and that he had collected the money on them without suit, and failed to pay it over on demand. The petition was somewhat informal, and the bond sued on does not appear to have been filed with the petition, but the answer waived all objections and took issue upon it. There was a trial before the court sitting as a jury, and the verdict and judgment were for the plaintiff. There was a motion for a new trial, and the case comes up by appeal.

It was proved that the constable received the notes for collection and that he collected the money, but failed to pay it over on demand: he gave no receipt for the notes, but called a third person to witness that he received them for collection; and the maker of the notes, when he was called on for payment by the constable, procured another person to pay the money for him on one of the notes, having paid the other himself, under an arrangement made with him that the note should be assigned by the constable to him, and be held by him until he should be reimbursed, and the amount was afterwards paid to him by the maker.

It is insisted by the defendants that they cannot be held liable, because the constable gave no receipt for the notes. The provisions of the statute upon the subject (R. C. 1855, p. 348, § 13, and p. 968, § 21) make it the duty of the constable to receive such demands for collection and to give his receipt therefor; and he and his securities are made liable

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on his official bond for the amount collected on them with or without suit, if he fail to pay over the money on demand, whereby any loss is sustained. This liability is not made to depend, in any manner, on the giving of a receipt. It is made his duty to give a receipt, but his responsibility on his bond depends on his failure to perform his duties and account for moneys collected. The 23d sec. of Art. VIII. of the Act concerning Justices' Courts provides a summary mode of proceeding against a constable and his securities, before a justice of the peace, in certain specified cases of failure of duty, among which the fourth is a failure to pay over on demand the money received on any demand placed in his hands for collection, and "for which he shall have given his receipt," or "any money or property received by him in pursuance of any of the provisions of this act." It is argued that these words show that it was the intention of the act to make the giving of a receipt a condition precedent of the liability. We do not think that this is the proper construction. It was doubtless the duty of the constable to give a receipt, if one had been required by the other party, and the clause in question supposes him to have done so; but the ground and reason of the liability are the failure to perform his duties as constable, and the omission to give a receipt only made his breach of duty so much the greater. The object of the act is to make him and his securities responsible on his official bond for all moneys collected in his official capacity; and this is further apparent from the words immediately following this clause: "or any money or property received by him in pursuance of any of the provisions of this act."

When the money was paid to the constable, he assigned the note, at the request of the parties, in these words: "I hereby assign the within note to Dr. Benjamin Rodgers.—Edward Grupe, constable." The constable had no power or authority to sell or assign the note to any other person. It was in his hands for collection only. It may be conceded that his assignment could have no validity or effect to trans-

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fer the legal title to the note, so as to enable the holder to sue upon the instrument as the owner of it. The evidence shows that the assignment was made in pursuance of an arrangement which the maker had made with Rodgers to pay the money for him and hold the note until he should be reimbursed. On these facts the jury might very well find that the note had been paid by the maker and that the money had been collected by the constable.

Another objection was that no demand was made previous to the action. In order that this should be of any avail to the defendants, it should have been set up as a defence in the answer, accompanied with a tender of payment of the amount that was due, and even then it would merely avoid the costs. (R. C. 1855, p. 448, § 34.)

It was further objected that the admissions of the constable were not admissible in evidence against the securities. It was said in the case of the State v. Bird, 22 Mo. 470, that the collection of the money being the official act of the officer and the *res gesta*, a subsequent narration of the affair was inadmissible as an admission against the securities. Here the maker of the note stated that when the constable called on him for payment, he told him that the note was in his hands for collection. This may be very well considered as a part of the *res gesta*. And if the other statement of the deputies that the constable had told them, after the money was collected, that he had received the notes of the plaintiff for collection, were in any degree liable to this objection, there was an ample sufficiency of other evidence to prove the same facts, and the verdict may be sustained without these admissions. The defendants do not appear to have suffered any prejudice, by reason of any error of this kind, which would justify us in reversing the judgment.

Judgment affirmed. The other judges concur.

Smith et al. v. Giegrich.

JAMES A. SMITH AND WILLIAM H. BIGGS, Appellants, v.
GEORGE GIEGRICH, Respondent.

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Bonds and Notes—Assignment.—The maker of a note payable in property cannot, as against an assignee in good faith, before maturity, for value, set up a defence he may have had against the payee, if the note be written "for value received, negotiable and payable without defalcation." (R. C. 1855, p. 322, § 8.)

Appeal from Lewis Circuit Court.

Southern & Blair, for appellants.

This is a negotiable note, not subject to a defence of partial or total failure of consideration, or fraudulent representations, when taken by an innocent purchaser for value, before due—R. C. 1855, pp. 319–20, §§ 1–3. The 1st section makes this a note importing a consideration, &c.; the 2d section makes it assignable; the 3d section exempts it from "set-off or other defence existing at the time of or before notice of assignment."

There is no distinction in this 3d section between a note payable in money or payable in property, and consequently no defence can be made to this note that could not be made to a note for the payment of money.

Hawkins, for respondent.

I. Such paper as the note declared upon by plaintiff is not negotiable. (Chit. on Bills, 133.) A note, to be negotiable, must be payable without any contingency whatever. (Coolidge v. Ruggles, 15 Mass. 387; Deforest v. Tracey, 6 Cow. 151–155.) Not negotiable if payable in bank bills. (McCormick v. Stratten, 1 Am. Lea. Ca. 308, &c.; Farwell v. Kennett, 7 Mo. 595.)

II. A note given for a patent that is void by reason of its being useless, is without consideration. (Dickerson v. Hall, 14 Pick. 220; Joliff v. Collins, 21 Mo. 338.)

WAGNER, Judge, delivered the opinion of the court.

This case comes here on an agreed statement of facts. The

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suit was originally instituted before a justice of the peace, on the following note:

"On or before the first day of March, 1859, I promise to pay unto Wm. H. Eads, or order, two wagons, to be worth seventy dollars a-piece, for value received, negotiable and payable without defalcation or discount. This 29th day of December, 1857. GEORGE GIEGRICH.

"JOHN HOW, Jr., attest."

The note was given to Eads, on his fraudulent representations, for a patent which it is admitted was entirely worthless. Before it became due it was endorsed to appellants for a valuable consideration, and they took it as innocent purchasers. Respondent, at the trial, interposed as a defence that the note was given without consideration. This defence was objected to, but it was allowed by the court, and judgment rendered in his favor.

The decision of the court below was correct, unless our statute has changed the rule of the common law. By the law merchant, it was the purpose of promissory notes to represent money, and perform as far as possible all its functions; it was of course, therefore, necessary that they should be made payable in money.

A promise in writing to pay or deliver specific articles, or to do any other act than to pay money, has none of the distinguishing characteristics or privileges of negotiable paper. (1 Pars. N. & B. 45.)

By universal usage, and the long established rules of law, a promissory note, to be negotiable, must be payable in money only—either in specie, or in funds which the court can judicially notice as equivalent to money. (4 Mass. 245; 5 Cow. 186; 10 Serg. & R. 94; 6 Cow. 108; 2 Nott & McCord, 519.)

But the common law must always yield to statutory enactments. If the Legislature have changed the character and effect of notes not heretofore negotiable, and invested them with all the attributes of such instruments, for certain purposes, we are bound to obey their authority and carry out

their intentions, without stopping to inquire about the policy. By R. C. 1855, p. 320, it is enacted :

“Sec. 2. All bonds and promissory notes, for money or *property*, shall be assignable in writing, or by an endorsement on such bond or promissory note, and the assignee may maintain an action thereon in his own name, against the obligor or maker, for the recovery of the money or *property* specified in such bond or note, or so much thereof as shall appear to have been due at the time of the assignment, in like manner as the obligee or payee might have done.

“Sec. 3. The obligor or maker shall be allowed every just set-off or other defence, against the assignee or assignor, existing at the time of or before notice of the assignment, unless it shall be expressed in the bond or note that the same is *for value received, negotiable and payable without defalcation.*”

Previous to the revision of 1855 we had no such law as that contained in section three *supra*. Unquestionably it abolishes the distinction between promissory notes payable in money and payable in property, so far as the defence is concerned, when in the hands of an innocent assignee. It was placed in the Revised Code as a substitute for section three of the act of 1849, p. 75, which provided that in case of an assignment of a thing in action, the action by the assignee should be without prejudice to an offset, or other defence, existing at the time of or before notice of the assignment; but it was further expressly provided that the section should not apply to bills of exchange, nor to promissory notes for the payment of *money*, expressed on the face thereof to be for value received, negotiable and payable without defalcation.

By placing the two sections in juxtaposition, there can be no difficulty in arriving at the true sense. The law formerly applied to notes for the payment of money; it was afterwards expressly changed so as to include property. For us to declare that the law has not been changed in its legal import,

would be to solemnly adjudicate that the Legislature have passed a law without any meaning.

The judgment is therefore reversed and the cause remanded. The other judges concur.



STATE OF MISSOURI, Respondent, v. DUDLEY JENKINS, Appellant.

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Crimes—Robbery—Larceny—Criminal Practice.—A party indicted for the crime of robbery in the first degree (R. C. 1855, p. 574, § 20) cannot be convicted of robbery in the second degree (R. C. 1855, p. 594, § 21), but may be convicted of larceny. It is of the essence of robbery in the first degree, that the violence or fear of injury should be present and immediate to the person, and that the property should be actually taken from the owner's person, or in his presence, and against his will.

Appeal from Cape Girardeau Circuit Court.

The facts are stated in the opinion. The instructions as given were:

1. If the jury believe from the testimony that a body of armed men went to the house of William H. McLane, and by force or threats caused him to fear that an injury would be done to his person or property, so that he concealed himself for his own protection, and that, while so concealed, his horse was feloniously taken and carried away by said body, or any of them, each of the persons engaged in any way in the transaction are equally guilty; and if the defendant was one of them, the jury may find him guilty of robbery in the second degree.

2. Such fear as prevents resistance is sufficient, and this may be presumed from the circumstance of the transaction, or from words used by either of the parties.

3. If the jury find the defendant guilty, they will state in what degree, and assess the punishment.

Clover and Jecko, for appellant.

I. The elements of the offence of robbery in the first degree, as defined by our statute, are—

1. The feloniously taking the property of another, which is larceny by itself.
2. From the person, or in the presence of, the owner.
3. Against his will.
4. By violence to his person, or, which is the same thing, by putting him in fear of some immediate injury to his person.

The elements of the offence of robbery in the second degree, as defined by our statute, are—

1. The feloniously taking the personal property of another.
2. In his presence, or from his person.
3. Which shall have been delivered or suffered to be taken.

Substituting this language for the expression “against his will,” as used in the definition of the offence of robbery in the first degree, as above; and,

4. Through fear of some injury to his (own) person or property, or to the person of any relative or member of his family, threatened to be inflicted at some different time (as distinguished from fear of *immediate* injury), which fear shall have been produced by the threats of the person so receiving or taking such property.

II. The proposition is asserted, that, under this indictment, which is an indictment for robbery in the first degree, the defendant could not be lawfully convicted of the offence of robbery in the second degree.

The Legislature has created three distinct offences, differently defined—as robbery in the first, second, and third degrees—and differently punishable. In each case, the indictment must specify the nature of the offence; and it must inform the defendant of the nature of the offence with which he is charged.

This offence of robbery is not of that character embraced in the legislation to be found in the 14th sec. of Art. IX. of

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the "Act concerning crimes and their punishment" (R. C. 1855, p. 640), whereby it is provided that upon indictment for any offence consisting of different degrees, as prescribed by the act, the jury may find the defendant not guilty of the offence charged in the indictment, and may find him guilty of any degree of such offence inferior to that charged in the indictment, or of any attempt to commit such offence or any degree thereof.

If the inferior degree be included in the allegations of the indictment then the statute applies, otherwise when the inferior degree is not so included. (*State v. Shoemaker*, 7 Mo. 177; *Conner v. State*, 14 Mo. 570; *Mallison v. State*, 6 Mo. 399; *Plummer's case*, 6 Mo. 240; *McGee v. State*, 8 Mo. 495.)

III. If the proposition contained in the first instruction be law, there is no protection for the most innocent of mankind. The defendant may have been a rebel, and yet utterly incapable of robbing Col. McLane of his horse; and yet without proof, so far as the instruction goes, he is to be held liable for the act of another, done in his absence, without his knowledge, against his will, and without any common intent for which he might be made liable.

IV. By intendment of law, the defendant has been forever acquitted of the offence of robbery in the first degree, with which he stands charged in the indictment, and upon which he can never again be tried. (*State v. Phillips & Ross*, 24 Mo. 475.)

J. P. Vastine, for respondent.

HOLMES, Judge, delivered the opinion of the court.

The indictment charged that William Jeffers, on the thirtieth day of September, A. D. 1862, at the county of Cape Girardeau and State of Missouri, "in and upon one William H. McLane, with force and arms, feloniously did make an assault, and the said William H. McLane in bodily fear of some immediate injury to his person then and there feloniously

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did put, and one horse, of the value of one hundred dollars, the property of the said William H. McLane, then and there feloniously did rob, steal, take and carry away"; and the defendant was charged as an accessory or principal in the second degree, under the statute. (R. C. 1855, p. 638, § 5.) The offence described is robbery in the first degree, under the statute (R. C. 1855, p. 574, § 20), which consists in "feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person." The jury rendered a verdict of guilty of robbery in the second degree, and fixed the punishment at five years in the penitentiary. The court instructed the jury, that if they believed from the testimony "that a body of armed men went to the house of William H. McLane, and by force or threats caused him to fear an injury would be done to his person or property, so that he concealed himself for his own protection, and, while so concealed, his horse was feloniously taken and carried away by said body, or any of them, each of the persons engaged in any way in the transaction is equally guilty; and if the defendant was one of them, the jury may find him guilty in the second degree." In another part of the record, this same instruction reads, in the last clause, "in the first or second degree"; but, in either case, it authorized a verdict of guilty in the *second* degree.

The offence of robbery in the second degree supposes a case where the property is delivered, or suffered to be taken, through fear of some injury to the person or property, threatened to be inflicted at some future and different time. It is clear that this last offence is not included nor contained in the description of the first offence, and that there are no words in the indictment which, by any construction, can be construed as describing the crime of robbery in the second degree. It is settled that if the inferior degree of offence be included in the allegations of the indictment, a conviction

of such inferior degree is consistent with established principles; but if the lesser offence be totally or essentially dissimilar in nature, and there be no count in the indictment which describes the inferior offence, or contains words which may include it, no judgment can be given for that offence. (State v. Shoemaker, 7 Mo. 177.) It is of the very essence of robbery in the first degree, that the violence or fear of injury shall be present and immediate to the person, and that the property shall be actually taken from his person, or in his presence and against his will; but in the second degree the property is supposed to be delivered, or suffered to be taken, through fear that a threatened injury may be inflicted at some different time, either to his own person or property, or to the person of any relative or member of his family. This offence is not described in the indictment, and the conviction and judgment for robbery in the second degree were clearly erroneous. The instruction is vaguely and ambiguously framed. It might be applied to either degree, but would rather seem to have contemplated the second degree, or the case where threats caused the party to fear that an injury would be done at a future time, so that he concealed himself for protection. It does not say an *immediate* injury. It was at least calculated to mislead the jury, and should not have been given in that form.

The verdict must be considered as amounting to an acquittal on the charge of robbery in the first degree, and upon this indictment the defendant cannot be convicted of robbery in the second degree. But the indictment does contain a description of the offence of grand larceny. The elements of description which distinguish robbery in the first degree from grand larceny may be regarded as surplusage, and enough would still remain to constitute and sufficiently describe the crime of grand larceny. (R. C. 55, p. 640, § 14; p. 575, § 25.) The judgment will therefore be reversed, and the case remanded for a new trial, in accordance with this opinion. The other judges concur.

Hiney v. Thomas et al.

BAZILE HINEY, Respondent, v. JOHN THOMAS AND EMMA THOMAS, Appellants.

Practice—Evidence—Fraud.—A creditor claiming title to land by virtue of a purchase under his judgment and a sale by the sheriff, and seeking to set aside a prior conveyance of the debtor on the ground of fraud, must show that he has acquired the title by a sheriff's deed, if the title be put in issue by the pleadings.

Appeal from Jefferson Circuit Court.

Beal & Thomas, for respondent.

Green, and Voullaire & Jourdan, for appellants.

HOLMES, Judge, delivered the opinion of the court.

This is a petition in the nature of a bill in equity by a judgment creditor who has subjected the land to sale by the sheriff, under execution, and himself become the purchaser, praying that a prior conveyance of the land to trustees, in trust for the separate use of the wife of the defendant John Thomas, be declared void, on the ground of fraud. It states that the purchase money was paid by the husband, and that the conveyance and settlement upon the wife were made to defraud creditors, existing and subsequent; and it states the judgment, execution and sale of the land by the sheriff, and alleges that at the sale the plaintiff Bazile Hiney "became the purchaser of the premises, by which purchase he became entitled to the land aforesaid." And he prays to have the conveyance to trustees to the use of the wife declared void; that the defendants be divested of title; that the title be absolutely vested in plaintiff, and that he may have a writ of possession for the premises.

The answer of the defendants denied all fraud, and denied that "Bazile Hiney acquired any right or title to said land by virtue of any purchase under said execution; or by virtue of any deed received from said sheriff."

On the trial before the court the plaintiff gave evidence tending to prove fraud, and showed the judgment, execution,

sale, and return of the sheriff showing that the land had been struck off to him for the sum of five dollars; but no deed from the sheriff was produced.

It is now contended on the part of the plaintiff that a deed to him from the sheriff was sufficiently admitted, as not being specifically denied or put in issue by the answer. The petition would have been demurable without a substantial allegation that the sheriff had conveyed the land by deed to the plaintiff. He would not be the purchaser in law, nor become entitled to the land otherwise than by a deed from the sheriff. His allegation is informal, argumentative and vague. We are not required to say it would be held sufficient on demurrer; but, such as it was, the defendants chose to take issue upon it, and the denial is certainly more positive, clear and definite than the allegation; and it expressly denies that the plaintiff became entitled to the land in controversy by virtue of any deed from the sheriff. This very material averment was thus distinctly put in issue. It would have been more in accordance with the rules of pleading if the plaintiff had made a formal and distinct allegation of a conveyance of the land by deed from the sheriff, and filed the deed itself as an exhibit with his petition.

Without showing that he had acquired the title of John Thomas, the plaintiff would be in no condition to complain of his frauds, and could not, therefore, be entitled to the relief for which he prayed. In the case of a creditor's bill, or where a creditor has obtained judgment and acquired a lien upon the property of his debtor, and files a bill to set aside a former conveyance or judgment and to enforce the lien, and to subject the property of the debtor to a judicial sale for the payment of his debts, the relief is granted upon the ground of the lien, or other equitable rights against the debtor's property. (*Martin v. Michael*, 28 Mo. 50; *Brinkerhoff v. Brown*, 4 J. Ch. 671; *Melville v. Brown*, 1 Harr. & J. 367.) In the case of the *United States Bank v. Burke* (4 Blackf. 141), where the debtor had died after judgment and before execution, it was held that a bill in equity might be maintained to

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annul a deed made in fraud of creditors, and to enforce the judgment lien against the property of the deceased by subjecting it to a judicial sale for the payment of the debt. But in this case the petition does not seek to enforce a judgment lien, nor to subject the property of his debtor to sale; but his object and the prayer of his petition is to have his own title set up, and to have certain prior conveyances removed, on the ground of fraud, as clouds or encumbrances upon the title which he has acquired to this land by his purchase at the sheriff's sale, under his judgment. It is obvious that he can have no standing in a court of equity, nor be entitled to the relief prayed for, until he establishes his title, and that cannot be done without showing a deed from the sheriff. (Smith v. Phillips, 25 Mo. 555.)

In any view of the case the judgment rendered was erroneous. For this reason the defendant's motion for a new trial should have been granted. There is no occasion that we should now go into any investigation of the matter of the fraud.

Judgment reversed and cause remanded. The other judges concur.

ROBERT KINEAR, Respondent, v. EDWARD W. SHANDS, Appellant.

1. *Attachment—Demand not due.*—An attachment cannot issue, upon a demand not due, for any of the causes specified in the subdivisions 1, 2, 3 & 4 of § 1 B. C. 1855, p. 238.
2. *Landlord and Tenant—Attachment.*—The removal by a tenant of a small portion of his furniture for temporary use elsewhere, the tenant not intending to leave the premises, will not authorize the landlord to sue out an attachment against the tenant under the act of "Landlords and Tenants." (B. C. 1855, p. 1015, § 26.)

Appeal from St. Louis Court of Common Pleas.

Minor, for respondent.

Holliday, for appellant.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his suit by attachment against defendant on account of rent not due. The affidavit for the attachment was made under the third subdivision of section one of the attachment law (R. C. 1855, p. 238), and also under the twenty-sixth section of the "Act concerning landlords and tenants" (*ibid.* 1015).

The proceeding, so far as the first cause alleged in the affidavit is concerned, was a nullity, as that does not authorize the issuing of an attachment on a demand not due; but the law regulating landlords and tenants authorizes the issuance of an attachment, founded on an affidavit, against a person where he is liable for rent (whether the same be due or not, if the rent be due within one year thereafter), if he intends to remove, or is removing, or has within thirty days removed his property from the leased premises.

Defendant filed his plea in the nature of a plea in abatement and the trial was had before the court, both parties waiving a jury. It appeared from the evidence on the trial of the plea in abatement, that, at the time the attachment was issued, the defendant was on a visit with his family at Paris, Monroe county, Missouri; and that his brother had packed up and shipped off to a Mrs. White's certain furniture which had been in the house, and which was her own property and never belonged to defendant. The only furniture of defendant's that was sent away, was a bedstead and some children's bedding, which were sent to defendant's wife for the comfort and convenience of the family whilst they were temporarily absent. There was no intention of removing any more. The furniture left in the house was worth \$800, double the amount of the plaintiff's debt. The family intended to return and occupy the house in the ensuing fall. The court in substance declared the law to be, that if at the time of the issuing the attachment in this cause the defendant was removing his property from the leased premises which he had leased from the plaintiff, then the verdict should be for plaintiff.

The following declarations asked by the defendant were refused :

" 2. Although the jury may believe from the evidence that the defendant or his wife removed a portion of defendant's property from the premises described in the plaintiff's petition before this attachment suit was instituted, yet if they further believe from the evidence that the property so removed was of small value as compared with the property of defendant left on said premises, and that the removal thereof was only temporary, and that property of defendant in value largely above the plaintiff's claim was left on said premises without any intention to remove the same therefrom, they must find for the defendant.

" 3. If the court sitting as a jury believe from the evidence that the defendant moved a few articles from the demised premises for temporary use and convenience only, leaving therein a large proportion of the property belonging to said house with the intent again to occupy said premises and remove back said articles removed therefrom, the verdict ought to be for the defendant."

The law to secure the landlord in the payment of his rent gives him a most full and ample remedy, where the tenant intends to remove, or is removing, or has within thirty days removed his property from the leased premises. But it is not within its meaning, scope or intent that this remedy should be applied and pursued where the defendant is removing merely a portion of his property for purposes of use or temporary convenience. It was certainly not the intention of the statute to conclusively forbid and restrain *in toto* the owner from removing for use any of his property off of the premises during the continuance of the tenancy.

The law as declared and carried out in the court below would warrant and authorize an attachment against a tenant for removing every article however worthless or useless, or however necessary to be used elsewhere, although no intention existed or attempt was made to remove from the premises, or to take away, any of the property of value.

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The special remedy by attachment in favor of the landlord we consider sufficiently stringent, without giving it any such rigid and unreasonable construction. The instruction stated the law fairly as applicable to the evidence, and should have been given.

The judgment is reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

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BENJAMIN LIEBER, Plaintiff in Error, v. THE ST. LOUIS AGRICULTURAL AND MECHANICAL ASSOCIATION, GARNISHEE OF JOHN GANTEB, Defendant in Error.

Attachment—Garnishee.—The pendency of a suit against the garnishee by the defendant in the attachment or execution will not relieve the garnishee from his liability under the garnishment. After being summoned as garnishee he cannot pay the money due to the attachment or judgment debtor.

Appeal from St. Louis Circuit Court.

The plaintiff recovered judgment against John B. Ganter on Feb. 24, 1858, for \$370.23, in the St. Louis Circuit Court, on which execution was issued Mar. 9, 1858, and the garnishee summoned as such on May 31, 1858. The plaintiff obtained, also, another judgment against said Ganter in the St. Louis Circuit Court, on the 30th April, 1858, for \$274.18. On this execution the garnishee was summoned as such on the 25th May, 1858. The plaintiff filed the usual interrogatories, to be answered by the garnishee in proper time. The garnishee duly filed its answer stating "that at the time of the service of the garnishment a suit was pending in the Court of Common Pleas, wherein John B. Ganter, the above-mentioned defendant, claimed some \$2,200 of the said garnishee; that after the service of said garnishment judgment was obtained by said Ganter against said association for the sum of \$453, upon which judgment execution issued, and the amount was paid by said association to the sheriff; that garnishee, at the time of said garnishment, was not indebted to said Ganter in any other manner."

It appeared from the records of the St. Louis Common Pleas Court, which were introduced in evidence, that John B. Ganter instituted the suit against the garnishee, mentioned in the answer of garnishee, on 19th Feb., 1858; that judgment was rendered therein June 4, 1858, for \$1,468; that on June 5th Ganter remitted \$1,015 of said judgment, leaving \$453 as a judgment; that the judgment was satisfied by the association on October 11, 1858.

C. F. Burnes and Holliday, for plaintiff in error.

I. A debtor is liable to the process of garnishment after suit brought for the debt, and before judgment, if the garnishment is served before the defendant is concluded, by the state of the pleadings, from showing in defence that the debt or property is attached in his hands. (*Thorndike v. DeWolf*, 6 Pick. 120; *Locke v. Tippetts*, 7 Mass. 149.)

II. A judgment debtor is liable to the process of garnishment. This is fully established by our own court in the case of the *Home Mut. Ins. Co. v. Gamble*, 14 Mo. 407; *Gager v. Watson*, 11 Conn. 168.

III. The pendency of the suit of *Ganter v. The St. Louis Agricultural and Mechanical Association* in the St. Louis Common Pleas Court, and the judgment being rendered in said suit in said court, would not exempt the defendant in that suit from liability as garnishee of Ganter, the defendant, under process issued from the St. Louis Circuit Court.

Authorities referred to:—1. *Howell v. Freeman*, 3 Mass. 121; *Thorndike v. DeWolf*, 6 Pick. 120; *Locke v. Tippetts*, 7 Mass. 149; *Smith v. Barker*, 10 Maine, 458; *Huff v. Mills*, 7 Serg. 42. 2. *Home Mut. Ins. Co. v. Gamble*, 14 Mo. 407; *Gager v. Watson*, 11 Conn. 168; *Halbert v. Stinson*, 6 Blackf. 398; *O'Brien v. Liddell*, 10 Smedes & M. 371; *Belcher v. Grubt*, 4 Harr. 461; *Crabb v. Jones*, 2 Miles, 130. 3. *McCarty v. Emlen*, 2 Dall. 277.

Barrel, for defendant in error.

LOVELACE, Judge, delivered the opinion of the court.

The judgment in this case cannot be permitted to stand,

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upon any sound legal principles. The defendant here was indebted to Ganter, the defendant in execution, at the time of the service of the garnishment, and his answer so stated. It was one of the class of persons which, under our statute, may be summoned as a garnishee; and the fact that the defendant in the execution was then suing for the same money, was no defence. The defendant was not the less a debtor of Ganter because Ganter was suing for the money.

In the *Home Mut. Ins. Co. v. Gamble*, (14 Mo. 407,) this court held that a judgment debtor might be summoned as a garnishee when there was a stay of execution and the garnishment was served during the stay. There was no defence in the defendant's answer, and judgment should have been rendered upon it; but, inasmuch as the garnishee is entitled to some allowance for answering, the case will be sent back to the Circuit Court for adjustment.

Judgment reversed and cause remanded. The other judges concur.



WILLIAM T. MASON, Defendant in Error, v. JOSEPH S. BARNARD AND ELIZA B. FITHIAN (HUGH A. GARLAND AND JOHN G. PRIEST, TRUSTEES), Plaintiffs in Error.

1. *Mortgage—Practice.*—Under the statute of this State, the proceeding for the foreclosure of the equity of redemption of a mortgage, or deed of trust, is a proceeding at law and not in equity.
2. *Practice—Error.*—Where no exceptions are saved in the inferior court, the Supreme Court will only notice errors apparent on the face of the record.
3. *Mortgage—Deed of Trust—Notes.*—Where a deed of trust given to secure the payment of several notes falling due at different dates—provided, that if any note should remain unpaid after it fell due, that then all the notes should become due—the notes become due only for the purpose of distributing the fund realized by the sale under the power. Such a provision will not authorize the rendition of a personal judgment against the maker before the notes mature.*
4. *Practice—Judgment—Error.*—A judgment rendered against a defendant upon a debt not due is erroneous, and the error may be taken advantage of even after a judgment by default.

* See *Morgan v. Martien*, 32 Mo. 438.

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5. *Mortgagor—Substitution.*—A. executed a deed of trust, in the nature of a mortgage, to secure a debt, and subsequently by deed poll conveyed the property to B., reciting in the conveyance that part of the consideration was the payment of the encumbrance by B.; *held*, that B. could not be considered as a mortgagor, and that a personal judgment against B. for the mortgage debt was erroneous. (R. C. 1855, p. 1089, §§ 10, 14.)

Error to St. Louis Land Court.

On the 9th May, 1859, Catherine Graham conveyed a lot of ground to Joseph S. Barnard for a consideration, which was partly paid in cash, and for the remainder he executed five promissory notes, all dated 9th May, 1859, one for \$319.80, due six months after date, and four others, each for \$638.16, due respectively in one, two, three and four years from date, and bearing six per cent. interest until paid. To secure these notes, Joseph S. Barnard executed a deed of trust on the land, bearing date the 9th May, 1859. By this deed it was provided, that, if default should be made in the payment of any one of said notes, "then all of said notes, at the option of the holder thereof, might be considered as due, and the said trustees, or either of them, might, without waiting for the maturity of any of the other notes, proceed to sell the said property, or any part thereof, at public vendue," &c., &c. "It being also agreed that in case any of said notes should remain unpaid after maturity, the same should bear interest therefrom at the rate of ten per cent. per annum, payable yearly." On the 13th June, 1859, Joseph S. Barnard executed and placed on record a deed of that date, whereby he conveyed to Eliza B. Fithian, in consideration of her assuming \$4,780.83, certain tracts of land, including the land conveyed to him aforesaid. This deed was executed by Joseph S. Barnard, not by Eliza B. Fithian.

It further appeared from the petition, that the last three of the above described notes "came to the possession of the plaintiff by delivery, and that thereupon and therefore he became the legal holder thereof, and entitled to the money due thereon, and to enforce the said deed of trust; "that

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the two years note is due and unpaid, and that the other two notes not yet due are also wholly unpaid"; that the said William T. Mason "elects to consider the notes above mentioned payable in three and four years immediately due, and payable in accordance with the terms of the said deed of trust." Wherefore, he "prays judgment that the defendants," [who were Joseph S. Barnard, Eliza B. Fithian, and the two trustees in the deed of trust] &c., &c., "be foreclosed of all interest, lien and equity of redemption in the said premises, and that the same be sold; that the proceeds thereof be applied to the payment of the costs and expenses of this action, and the payment of the amount due on said notes, under and in accordance with the terms of the said deed of trust, with interest on the said money up to the time of payment; and if the money arising from the sale of said premises should be insufficient to pay the amount due and coming to the plaintiff on account of said debt, on the ascertainment of such deficiency the plaintiff may have judgment over personally against as well the said Eliza B. Fithian as the said Joseph S. Barnard for the amount thereof, together with interest and costs," and such further relief as to the court might seem fit.

This petition was filed on the 12th December, 1861, and on the same day a writ of summons was issued against all the defendants and returned served.

On the 10th day of February, 1862, there was a decree *pro confesso* against Barnard and Fithian. Garland and Priest, trustees in the deed, answered; and on the 23d October, 1862, the following decree was made:

"William T. Mason, v. Joseph S. Barnard, Eliza B. Fithian, Hugh A. Garland, and John G. Priest.

"Now, at this day this cause coming on for trial, and the petition of the plaintiff having heretofore been taken as confessed against the defendants Joseph S. Barnard and Eliza B. Fithian, who, although summoned and called, failed to appear and answer the same, and all of said defendants now failing to appear, on motion of the plaintiff's attorney,

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the same is submitted to the court for trial on the pleadings and proofs; and the court having duly heard and considered the same, and it appearing therefrom that the plaintiff is entitled to the judgment asked for in his petition, and proceeding to ascertain the amount due and payable to the plaintiff by the defendants Joseph S. Barnard and Eliza B. Fithian, for the debt mentioned in the petition and the deed of trust set forth therein, and interest thereon to the date thereof the court doth find the same to be two thousand three hundred and eleven dollars and thirty-seven cents. The court doth therefore order, judge and decree, that the plaintiff do recover of the said Joseph S. Barnard and Eliza B. Fithian the said sum of money, together with legal interest thereon from the date hereof, and the costs of this suit, to be levied of the following real estate," &c., &c., (describing the land designated in the deed of trust) "and it is further ordered, adjudged and decreed, that if the said real estate and premises be not sufficient to satisfy the said debt, interest and costs, then the residue thereof shall be levied of other goods, chattels, lands and tenements of the defendants Joseph S. Barnard, Eliza B. Fithian," &c., &c.

To reverse this judgment, Joseph S. Barnard and Eliza B. Fithian brought a writ of error.

T. T. Gantt, for plaintiffs in error.

I. It was grossly irregular to take judgment on notes not yet due, even as against Joseph S. Barnard; and as against Eliza B. Fithian, who was never a party to these notes, such judgment was an absolute nullity.

II. It was wholly without legal warrant that the court proceeded to give against Eliza B. Fithian any judgment extending beyond her interest in the property described in the deed of trust, or subjecting any other property of hers to execution under that judgment. (Riley, Adm'r, v. McCord, 24 Mo. 265; R. C. 55, §§ 10-11, p. 1089; Simmons v. Blake, 20 How., N. Y., 482-486.)

III. The proceeding as to Mrs. Fithian is not only irregu-

lar so far as to be erroneous, but is utterly void so as to defeat the title of the purchaser under such judgment of any property not embraced in the mortgage deed, or deed of trust. (20 How. N. Y., Prac. 482.)

IV. Although there is an allegation in the petition that "by the terms of the same conveyance the said Eliza B. Fithian [did] expressly assume and agree to pay off and discharge the amount of said encumbrance, or deed of trust upon the said premises, as a part of the consideration or purchase money therefor," yet the petitioner makes this same deed a part of his petition, and it is quite plain from an inspection of its tenor that this allegation is untrue in fact and in law, and so it appears on the face of the petition itself that Eliza B. Fithian was in nowise liable for this debt or encumbrance.

V. It equally appears from the petition itself that the plaintiff was not entitled to judgment for the debt or encumbrance against any one, the debt not being due even when judgment was rendered, and still more not due when suit was commenced.

R. M. Field, with *Glover & Shepley*, for defendant in error.

I. The petition shows a good cause of action against Mrs. Fithian. The deed to her was not a grant of the mere equity of redemption subject to the debt, but was a conveyance of the land generally, she taking the title and agreeing to pay off and discharge the encumbrance as a part of the consideration. *In equity*, as between herself and Barnard, she thus became the principal debtor, his situation being that of surety for her. (24 N. Y. App. 178; 14 Iowa, 476; 21 Texas, 27; 4 Ohio, N. S. 353; 15 Ind. 160.) The acceptance of a deed with such a clause in it is equivalent to an *express* promise to pay the mortgage debt. (1 Gray, 317.) It not necessary to aver the delivery or acceptance of a deed; and an acceptance will be presumed, when the deed is beneficial to the grantee. The obligation of the

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purchaser enures by equitable subrogation to the benefit of the creditor, or holder of the mortgage. (10 Paige, 468; 9 *id.* 446; 2 Beaseley's Ch. 63; 4 Ohio, N. S. '333; 27 Conn. 615; 24 N. Y. App. 179; 11 Iowa, 88; 7 Cal. 106.)

II. There was no misjoinder. As to the principal defendants there was a common subject matter—the mortgaged premises and the debt. Although formerly regarded as different causes of action, the one equitable and the other legal, both may now be joined. (Willard's Eq. 452; 14 Iowa, 476; 10 Cal. 299; 21 Texas, 27; 10 Ohio, N. S. 438-9.)

So far, then, as relates to the petition, if, notwithstanding their default and neglect in the court below, the plaintiffs in error are still entitled to question its sufficiency; as there was no defect of jurisdiction, it can only be upon the single ground that it contains no cause of action whatever. This objection is untenable for the reasons already suggested. Two of the notes were due at the date of the judgment; the first when the suit was instituted, and the last has since matured. Besides, by the terms of the deed of trust all were to become due, at the option of the creditor, if default were made in the payment of either. Such a contract will be enforced in a court of equity. (Valentine v. Van Wagner, 37 Barb. 60; Plank Road v. Murray, 15 Ill. 337; Kramer v. Rebman, 9 Iowa, 116; 3 White & Tudor, Lead. Cases, 672.) More pointedly to the purpose is Evey v. Smith, (18 Ind. 461.) A judgment of foreclosure will not be reversed because, amongst other things, it was given for the whole sum specified in the mortgage, though part of it was not due when the judgment was rendered. In principle, this is precisely our case; for in Indiana, as in New York, the statute authorizes a judgment over for the deficiency only where "the defendant is liable for the same at law." (20 Ind. 21; 34 Mo. 373; *id.* 321.)

WAGNER, Judge, delivered the opinion of the court.

Several questions have been elaborately discussed in the argument of this cause, which we have found it unneces-

sary to consider, as the record discloses two points which must control and decide it.

No exceptions being saved in the court below, we can notice nothing except error apparent on the face of the record. The equitable doctrine of subrogation, insisted on by the counsel for the defendant in error, can have no application for the reason that the petition is not in the nature of a bill in equity, but a proceeding strictly in accordance with the statute regulating foreclosures. A bill in equity could not ask such relief as the plaintiff demanded in his petition, and no chancellor exercising exclusively equitable powers would have been justified giving such a decree or judgment as the court rendered in this cause. By a bill in equity the property might be subjected to the payment of the trust debt, but there the proceedings must cease; and if a general judgment is desired for the residue of the debt, where the property proves insufficient, it can only be obtained by invoking the aid of the statute. And it is now well settled that a proceeding to foreclose the equity of redemption of a mortgage or deed of trust, under our statute, is a proceeding at law, and not governed by the rules of proceedings in equity; and this, it seems, is not altered by the code allowing legal and equitable remedies to be joined. (*Thayer v. Campbell et al.*, 9 Mo. 277; *Riley v. McCord*, 24 Mo. 265.)

The prayer of the petition is for judgment that the defendants and each of them, and all persons claiming under them, may be foreclosed of all interest, lien and equity of redemption in the premises, and that the same be sold, and that the proceeds thereof be applied to the payment of the costs and expenses of the action, and to the payment of the amounts due on the said notes; and that should the proceeds arising out of the sale of the premises be insufficient to satisfy the debt, then upon the ascertainment of the deficiency for a general judgment over personally against the defendants for the residue.

Upon this prayer the court gave judgment foreclosing the

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equity of redemption in and to the premises described in the deed of trust; and also further ordered, adjudged and decreed, that if the said real estate and premises were not sufficient to satisfy the debt, interest and costs, then the residue should be levied of the other goods, chattels, lands and tenements of the defendants. By the terms of the deed of trust, the trustee was empowered to sell all the property when the first note fell due; and they were all to be considered, at the option of the person holding the same, to be matured upon the first default, for the purpose of the application of the trust fund.

But the reason for such a provision is obvious. Upon a sale of the whole property, if the purchase money exceeds the amount due on the first note, it would have to lie in the hands of the trustee without interest till the succeeding note matured, if no condition was made to the contrary; and the condition inserted to elect to consider them all due, was for the purpose of distributing the trust fund to all when the property was sold, but for that purpose only. It was never intended that they should become due for the purpose of obtaining a judgment at law.

It has been often held that where suit is brought on a cause of action before the same is past due, the proceeding is not only wrong, but the defendant aggrieved thereby may avail himself of the objection by prosecuting his writ of error even after judgment by default. (*Randolph v. Cook*, 2 Port. Ala. 286; *Lowry v. Lawrence*, 1 Caines, 69; *Cheat-ham v. Lewis*, 3 Johns. 42; *Ward v. Honeywood*, Doug. 61.) But in *Blount v. McNeil* (29 Ala. 473), a distinction is taken where the entire cause of action is immature at the commencement of the suit, and where a part only is not due when the suit is instituted. And it is decided that, in the latter case, the defence could only be partial, going simply to the notes not due, and that it would not be available when no objection was in any way made in the court below. But the determination was made upon the provisions of the code in that State. But what must be considered as decisive in

the case at bar, is the judgment against Mrs. Fithian. Barnard executed to her a deed for two pieces of property, one of them being the same which was bound by the deed of trust. It is recited in the said deed, that, as a part of the consideration, she is to pay off the notes embodied in the said deed of trust; but this was a deed-poll, not a deed *inter partes*; it was executed by Barnard alone, and never executed or acknowledged by Mrs. Fithian.

As has been heretofore observed, this proceeding was wholly statutory; and the statute declares that when the mortgagor has been duly summoned, the judgment, if for the plaintiff, shall be that he recover the debt, damages and costs, to be levied of the mortgaged premises; and that if the mortgaged property be not sufficient to satisfy the same, then the residue to be levied of other goods, chattels, lands and tenements of the mortgagor. (2 R. C. 1855, p. 1089, §§ 10, 14.)

Mrs. Fithian never executed the instrument—could in no sense be said to be a mortgagor; and the judgment over against her, personally, was erroneous and irregular.

Judgment reversed and cause remanded. Judge Holmes concurs; Judge Lovelace absent.



THE COVENANT MUTUAL LIFE INSURANCE COMPANY, Respondent, v. HENRY A. CLOVER AND FRANCIS H. MANTER, Appellants.

Judgment—Error.—A judgment at law is an entirety—good as to all, or bad as to all the defendants. A judgment rendered jointly against the maker and endorser of a promissory note, in a suit in which the maker was not served with process, is erroneous as against the endorser, and will be reversed upon writ of error or appeal.

Appeal from St. Louis Court of Common Pleas.

Clover, for appellants.

The court below rendered judgment against a party never

served with process, to wit, F. H. Manter. This is apparent from an inspection. The judgment is irregular and void, as a whole, it being an entire thing; and being necessarily to be reversed as to one, must be reversed *in toto*. (Dickinson v. Chrisman, 28 Mo. 135.) No motion or bill of exceptions was necessary under the established practice of this court, the error being of record.

Whittelsey, for respondent.

I. The appellant Clover cannot take advantage of the defect in the judgment, although it may be erroneous, for the reason that the error does not affect him. The defendant cannot reverse a judgment for error, unless the error affect such defendant. (Jaqueth v. Jackson, 17 Wend. 484; Papin v. Massey, 27 Mo. 445, 453.)

In the cases of *Pomeroy v. Mellen* (31 Mo. 419) and *Smith v. Rollins* (25 Mo. 410) the defendants not properly served appeared in the court below, and moved the court to set aside the judgment; and their motion being overruled, they appealed. The defendants, affected by the error, took proper advantage of that error, and the judgment being reversed was reversed as to all.

In this case, no motion to set aside or arrest the judgment was made in the court below either by the defendants Manter or Clover.

II. No exception having been taken to the action of the court below rendering judgment, this court cannot pass upon the question presented by appellant. (R. C. 1855, p. 1300, § 33; *Richardson v. George*, 34 Mo. 104, 108; 25 Penn. 434; 10 Texas, 116; *St. Bt. Thames v. Erskine*, 7 Mo. 213; *Long v. Story*, 13 Mo. 4.)

III. The error does not affect the merits of the action as against appellant. (R. C. 1855, p. 1300, § 34, & note *b.*, and cases there cited.)

WAGNER, Judge, delivered the opinion of the court.

Respondent sued Manter as maker and Clover as endorser

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of a negotiable promissory note. Manter was not served with process, and judgment was rendered against both. Clover appealed to this court, and the only error relied on is, the irregularity in rendering judgment against Manter, when the court had no jurisdiction over him. It is insisted that the judgment is good against Clover, and that he cannot take advantage of the defect as to his co-defendant, because it does not affect him. But this is a judgment at law—an entirety; it is good as to all, or bad as to all; and an entire judgment against several defendants, will be reversed as to all, if it be erroneous as to one. (*Cox v. Lowther*, *Ld. Ray*, 601; *Rush v. Rush*, 19 Mo. 441; *Smith's Adm'r v. Rollins*, 25 Mo. 408; *Pomeroy v. Betts*, 31 Mo. 419.)

The judgment is reversed and the cause remanded. The other judges concur.

STATE OF MISSOURI, Respondent, *v.* G. T. EDWARDS, Appellant.

Slavery—Larceny.—The possession of the slave is the possession of the master. An indictment, therefore, charging the defendant with purchasing from a slave, property belonging to the master, is bad on motion in arrest.

Appeal from Washington Circuit Court.

The indictment was as follows :

“State of Missouri, County of Crawford.—In the Crawford Circuit Court, June Term, A. D. 1859.

“The grand jurors for the State of Missouri, empannelled, sworn and charged to inquire within and for the body of the County of Crawford, upon their oath present, that a certain slave named Garrison, the property of one James H. Monterey, on the first day of January, in the year A. D. 1859, in the county aforesaid, did then and there unlawfully steal, take and carry away a certain sack of wheat, containing two bushels, of the value of two dollars, the property of

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one James H. Monterey, contrary to the statute in such case made and provided, and against the peace and dignity of the State; and the jurors aforesaid, upon their oath aforesaid, do further present that one G. T. Edwards, late of the county aforesaid, on the day and year aforesaid, in the county aforesaid, the sack of wheat aforesaid, containing two bushels as aforesaid, of the value aforesaid, so as aforesaid unlawfully stolen, taken and carried away unlawfully, did receive and have, he, the said G. T. Edwards, well knowing the said sack of wheat to have been unlawfully stolen, taken and carried away contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

Charles Jones, for appellant.

I. It has not been clearly proved to whom the wheat in controversy belonged, and to convict, it must be proved to be the property of the person alleged in the indictment to be the owner thereof, James H. Monterey.

II. The revised statute of 1855, § 43, on which the indictment is produced, does not refer to this class of cases mentioned in the indictment, such as buying of or receiving property alleged to be stolen by slaves, for there is a special statute (p. 1477, § 83) that refers to such cases as buying and receiving of property from slaves.

And this is very apparent, for the reason that slaves are not presumed to own property, and the Legislature has provided the punishment for buying of or in anywise trading with slaves. (R. C. 1855, p. 1477, § 83.) The punishment, both civil and criminal, is therefore by statute.

The indictment in this case should have been predicated upon sec. 83, art. 1, of "An act concerning slaves," p. 1477. If defendant is guilty of any offence, he is guilty under the last mentioned act concerning slaves.

Vastine, for respondent.

I. The indictment alleges the sack and wheat to be the

property of James H. Monterey. It is not a defect which tends to the prejudice of the substantial rights of the defendant, upon the merits. (R. C. 1855, p. 1177.)

II. The indictment is properly framed on § 43, p. 580, R. C. 1855: "Every person who shall buy, or in any way receive, personal property that shall have been stolen from another, shall, on conviction," &c. The evidence answers the demands of the law; to say otherwise, is to deny the legal guilt of a slave stealing from his master. This section of the law is applicable to all, whether white or black, free or slave, who violate it.

The indictment ought not to have been framed on sec. 33, p. 1477, R. C. 1855. This section refers to a mere trading and dealing with slaves; an honest trading as it were, not to a fraudulent and felonious trading and dealing as the former one does. This section makes no reference to a larceny or a felonious receiving of stolen property.

HOLMES, Judge, delivered the opinion of the court.

The indictment charges the defendant with receiving stolen goods from a slave, knowing them to have been stolen by the slave from his master. The statute under which the indictment appears to have been framed (§ 43 of Art. III., R. C. 1855, p. 580) had no application to such a case. The possession by a slave of the property of his master, is the possession of the master. (*Hite v. State*, 9 Yerg. 198.) If the defendant had taken the property from the slave with intent to steal, he might have been indicted for the larceny; or, for trading with slaves, he might have been proceeded against under the 33d sec. of the "Act concerning slaves." (R. C. 1855, p. 1477.) The indictment was bad on motion in arrest.

Judgment reversed. The other judges concur.

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STATE OF MISSOURI, Respondent, v. HENRY BRAUNSCHWEIG,
Appellant.

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1. *Criminal Practice—Trial—Verdict.*—In cases of felony, the accused must be personally present at the trial, and no verdict can be entered against him except in his presence.
2. *Criminal Practice—Appearance.*—If the accused appear and plead to the indictment, no more formal arraignment is necessary.

Appeal from the St. Louis Criminal Court.

Gottschalk, for appellant.

The statute expressly recognizes the right of the defendant to be arraigned. (R. C. 1855, p. 1180, § 22; 22 Mo. 321; 27 Mo. 267; State v. Mathews, 20 Mo. 56.)

The second point is, that the verdict was rendered in the absence of defendant. The statute is positive. (R. C. 1855, p. 1191, § 16.) Defendant has the right to poll the jury, which is taken from him if the verdict is rendered in his absence. The authorities are uniform. (State v. Buckner, 25 Mo. 167; State v. Cross, 27 Mo. 332; State v. Mathews, 20 Mo. 55; 1 Archb. Cr. Pl. 173, note 2; 1 Chit. Cr. Law, 136; 1 Wend. 91; 1 Ill. 109.)

Vastine, for respondent.

In all cases where defendant does not confess the indictment to be true, a plea of not guilty shall be entered, and the same proceedings shall be had, in all respects, as if he had formally pleaded not guilty to such indictment. (R. C. 1855, § 5, p. 1181; State v. Andrews, 27 Mo. 267; Meader v. State, 11 Mo. 363; State v. Weber, 22 Mo. 325.) Defendant took no exceptions on this point. (State v. Mathews, 20 Mo. 55.)

The defendant ought not to be allowed to take advantage of his own wrong. The defendant, having entire control of his movements, was absent voluntarily. (R. C. 1855, p.

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1191, § 16; Bouv. L. D. 621, 600. It is unlike the case where one is absent by the neglect of the officers of the law.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted in the Criminal Court of St. Louis for grand larceny. The indictment contained two counts; the jury found the defendant guilty on the second, and acquitted him on the first. The record states that defendant appeared in proper person, and also by counsel, at the trial, and waived the reading of the indictment and plead not guilty. It also shows that after the evidence was submitted to the jury, as well on behalf of the State as the defendant, and the arguments of the respective counsel were had, the jury retired to consider of their verdict; that after agreeing on a verdict and upon returning into court, the the court ordered the defendant to be called, and that he failed to appear and made default.

This being on Saturday in the week, the jury, by direction of the court, sealed up their verdict and retained the same till the next Monday, at which time they again appeared; the defendant being called, came not; the court then received the verdict and had it recorded, and ordered a *capias* issued for the defendant, and declared a forfeiture of his recognizance. A few days afterwards, and during the same term of the court, he was arrested by the marshal and brought into court, whereupon the judge sentenced him to three years' imprisonment in the penitentiary, in accordance with the verdict.

The two main grounds argued for a new trial, are, that the prisoner was never arraigned as the law directs, and that the court erred in receiving the verdict in his absence. Much of the common law solemnity that was formerly used in the formal arraignment of those who stood indicted for crime is now dispensed with. There were reasons for an adherence to them which do not now exist. It was at one time necessary to ask him how he would be tried; but as the right to trial by battle never obtained with us, and the

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law has provided that every such issue shall be submitted to a jury of the country, as the exclusive triers of the fact, that question would be entirely meaningless. Our law does not demand that he shall formally and explicitly plead not guilty: if he requires a trial, or does not confess the indictment to be true, it is the duty of the court to enter a plea of not guilty, and proceed in the same manner as if he had formally pleaded. (2 R. C. 1855, § 5, p. 1181.) The defendant was present with his counsel when the jury was empannelled, waived the reading of the indictment, a plea of not guilty was entered of record, and we do not see how he can be injuriously affected because the arraignment was not made in a solemn, formal manner.

But this case must be reversed for the error committed by the court in receiving the verdict in the defendant's absence. "No person indicted for a felony can be tried unless he be personally present during the trial." (2 R. C. 1855, p. 1191, § 16.) Trial is the examination of a cause, civil or criminal, before a judge who has jurisdiction of it, according to the laws of the land; and the trial is not final and complete till the verdict is received and judgment entered. The statute requires that the prisoner, on a charge of felony, shall be present during the whole trial, and all proceedings had in his absence are erroneous. This court has frequently determined that it was necessary for the record to show that the prisoner was present in court during the trial. Here, the record shows that he was not present. (State v. Mathews, 20 Mo. 55; State v. Buckner, 25 Mo. 167; State v. Cross, 27 Mo. 332.)

Judgment reversed and cause remanded. Judge Holmes concurs; Judge Lovelace absent.

STATE OF MISSOURI, Respondent, v. RICHARD MARSHALL,
Appellant.

1. *Jurors—Exceptions—Criminal Practice.*—Objections to the panel, or to jurors, must be preserved by exceptions.

Criminal Practice—Venue.—It is not necessary that the order of the court, directing the sheriff to summon jurors, should be under the seal of the court.

Witness—Evidence.—A witness may decline answering questions which tend to criminate himself.

4. *Criminal Practice—Statement—Evidence.*—The statement made by the prisoner before the committing magistrate is not admissible in evidence either for or against the prisoner.

5. *Practice—Motion for New Trial—Criminal Practice.*—Such errors as appear upon the face of the record, or such as may be taken advantage of by a motion in arrest or by a writ of error, will, in criminal cases, be noticed in the Supreme Court as a matter of course; but as to exceptions taken in the progress of the trial, and as to motions for a new trial and in arrest which become part of the record only by bill of exceptions, the same rule governs in criminal as in civil cases.

6. *Practice—New Trial.*—No exception can be taken in the Supreme Court, upon appeal or writ of error, to matters not appearing upon the face of the record, unless they are made part of the record by bill of exceptions and have been expressly decided by the court below, which must appear by the filing and overruling a motion for a new trial, and exceptions thereto preserved. It is not required by the statute (R. C. 1855, p. 1286, § 6) that the motion for a new trial should specify the reasons for which it is made, but that is the better practice. By the Practice Act of 1849 it was not necessary that the exceptions should be saved by a motion for a new trial. (*Fine v. Rogers*, 15 Mo. 315; *Wagner v. Jacoby*, 26 Mo. 580; *Prince v. Cole*, 28 Mo. 486; *Gray v. Healep*, 38 Mo. 248, commented upon. See *Richmond's Adm'x v. Wardlaw & Pogue*, ante, p. 818.)

Appeal from Washington Circuit Court.

Vastine, for respondent.

The law does not require an order of the court on the sheriff to be sealed. (R. C. 1855, p. 910, § 2.)

Appellant waived all informalities, if any, in the empannelling of the jury, by going to trial without making exceptions thereto. (*Samuels v. State*, 3 Mo. 68.)

The State can prove declarations of defendant, but defendant cannot prove them, when objection is made.

John T. Witham, for appellant.

HOLMES, Judge, delivered the opinion of the court.

The defendant was indicted, tried and convicted of murder in the first degree, and sentenced to be hung, and an appeal was taken to this court. There was no motion in arrest of judgment; no motion for a new trial appears in the bill of exceptions. Some exceptions were taken and objections were made, in the progress of the trial, without saving exceptions. Nevertheless, we have examined the whole record, in order to see if there were any error that would justify us in reversing the judgment.

It is objected that the jury was not summoned in accordance with the provisions of the statute. There was no challenge to the array; no exceptions are saved to the ruling of the court on any part of the proceedings relating to the selection and empannelling of the jury. The juror whose competency was objected to, was not called and sworn to sit on the panel. It was not necessary that the order of the court, directing the sheriff to summon jurors, should be issued under the seal of the court. All these points are decided in *Samuels v. State* (3 Mo. 68). The judgment of the law is that the proceedings were correct, unless it be shown by the record that they are erroneous. (*Walter v. Cathcart*, 18 Mo. 256.)

Questions were asked the witness David N. Baker, whether he had ever had a difficulty with his father, the deceased; whether he had not, previously to his father's death, threatened to take his life; whether he had not previously forbid his father and mother his house; whether he and his father had not fought, at or near this same spot, at a previous time; and whether, at or near the same spot, at a previous time, he had not drawn a knife on his father, and threatened to kill him. To the first question the witness objected to answer, and his objection was sustained; and the other questions, the circuit attorney interposing, were also ruled out. These matters had no tendency to show any feelings of hostility on the part of the witness towards the prisoner, in which case they might have been admitted. They related, in part, to another time

and a different transaction, and to collateral facts which were impossible of affording any reasonable presumption or inference as to the principal matter under investigation; and as such they were irrelevant. (1 Greenl. Ev. §§ 52, 450.) As tending to criminate himself, he was privileged to refuse to answer; and having declined to answer the first question of the series, it may fairly be taken that his refusal continued, though the circuit attorney interposed afterwards for his protection. (1 Greenl. Ev. § 451.)

The whole evidence was of such a character as satisfactorily to sustain the verdict of the jury, and we do not find any such error in these rulings as would justify a reversal of the judgment.

It is insisted that there was error in excluding from the jury by instructions the statement of the prisoner, which was taken down by the examining magistrate after it had been admitted at the instance of the defendant. This statement was not competent evidence either for the State or for the prisoner, and there was no error in excluding it from the jury. (Green v. State, 13 Mo. 394.) If it had been admitted for the State against the accused, and then excluded from the jury by instruction, there would have been some ground for the objection. (State v. Mix, 15 Mo. 153; State v. Wolf, 15 Mo. 168.)

The instructions were excepted to on the ground that they tended to mislead the jury, and for the reason that they told the jury to disregard the statement of the prisoner, made after the transaction. Such declarations could not be evidence in his own favor. There was nothing in the instructions which could have misled the jury in any way prejudicial to the rights of the prisoner. They placed the whole matter fairly enough before the jury.

It appears by the record, that a motion for a new trial was made and overruled; but the motion itself was not made a part of the bill of exceptions, nor does it appear in the record. We think proper, on this occasion, to state distinctly what we conceive to be the law on this subject, under existing

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statutes, as applicable both to civil and criminal cases. The "Act concerning parties in criminal cases" declares that no assignment of errors, or joinder in error, shall be necessary, on an appeal or writ of error, in a criminal case; but that this court shall proceed upon the return thereof, without delay, to render judgment upon the record before them. (R. C. 1855, p. 1205, § 20.) It provides nothing directly in relation to a motion for a new trial, or in arrest of judgment. All such errors as appear upon the face of the record, or such as may be taken advantage of by a motion in arrest, or by a writ of error, will be noticed here as a matter of course; but as to exceptions taken in the progress of the trial, and as to motions for a new trial, and in arrest, which can become a part of the record only by bill of exceptions, the same rules are to govern as in civil cases. The act concerning criminal practice expressly declares, that the provisions of law in civil cases relative to the attendance and testimony of witnesses, their examination, the administration of oaths and affirmations, and proceedings as for contempt, to enforce the remedies and protect the rights of parties, shall extend to criminal cases as far as they are in their nature applicable thereto, subject to the provisions contained in any statute; (R. C. 1855, p. 1191-2, § 18;) and verdicts may be set aside, and new trials awarded, on the application of the defendant, and continuances may be granted to either party, in criminal cases, for like causes and under the like circumstances as in civil cases (§ 19). And no exceptions can be taken, on an appeal or writ of error to this court, to any proceedings had in the progress of the trial in the court below which are of such nature that they do not appear on the face of the record, nor become a part of the record without being made so by a bill of exceptions, unless they have been expressly decided by the court below (R. C. 1855, p. 1300, § 33); and in order that it may appear that such exceptions have been expressly decided by the court below, there should be a motion for a new trial, which should appear in the bill of exceptions, as overruled, and an exception should be taken to

the decision of the court thereon. And all motions for a new trial, or in arrest of judgment, must be made and filed within four days after the trial, if the term so long continue; or if it does not, then before the term is ended. (R. C. 1855, p. 1286, § 6; Williams v. St. Louis Circ. Ct., 5 Mo. 248; Allen v. Brown, 5 Mo. 323; Field v. Cathcart, 8 Mo. 686; Harvey v. Henry, 18 Mo. 466; Richmond's Adm'r v. Wardlaw & Pogue, *ante*, p. 818.)

The Code of Practice of 1849 wholly omitted the first and second sections of Art. VII. of the previous act concerning practice at law, which required motions for a new trial and in arrest of judgment to be made within four days after the trial, and ~~that~~ they should be accompanied with a written specification of the reasons upon which they were founded, (R. C. 1845, pp. 829-80,) and it provided for a peculiar mode of trial and a special verdict, or a special finding of fact by the jury; and the third section of Art. XI. provided that a new trial might be granted in certain cases enumerated therein, but made no provision for a motion for a new trial otherwise, though it would appear by the third section of Art. XXVI. that such motions were contemplated by the act. (Laws of 1849, pp. 87 & 100.) The cases of Fine v. Rogers (15 Mo. 315), and Wagner v. Jacoby (26 Mo. 580), and Prince v. Cole (28 Mo. 486), and Gray v. Heslep (33 Mo. 248), were based expressly upon the acts of 1849, and upon the changes made since that time.

By the Practice Act of 1855 (R. C. 1855, p. 1286, Art. XIII., § 6) the first section of Art. VI. of the act of 1845 was restored, and the mode of trial was changed. With this change in the statute provisions (which was not particularly noticed in the above cases) the case of Fine v. Rogers ceases to have any application or authority in respect of the necessity of a motion for a new trial and the time within which it must be filed. But the second section of Art. VI. of the act of 1845, providing that "every such motion shall be accompanied with a written specification of the reasons upon which it is founded," was not re-enacted in the revision of 1855;

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and by force of the twentieth section of the "Act concerning Revised Laws" (R. C. 1855, p. 1026) it would seem to have been repealed, even if it were not previously repealed by the act of 1849. The result is, that while such motions must now be made and filed as formerly, it is no longer absolutely required that they shall contain a special statement of the reasons on which they are founded; and this was all that was decided in *Wagner v. Jacoby* (26 Mo. 530), and in *Prince v. Cole* and *Gray v. Heslep*. The chief object of the motion would seem to be, that the attention of the court below may be expressly called to the exceptions that are taken, in a final review on a motion for a new trial, or in arrest. During the progress of the trial there is no time for much consideration of the points that arise; but the motion affords an opportunity for a more careful examination and a more mature deliberation. And it would seem to be highly proper that the reasons and grounds of the motion should be stated therein, at least in such general terms as would comprehend the exceptions which have been taken and noted on the trial. But the statute has not seen fit to require a written specification of the reasons.

It must be taken that the intention of the act was, that when a motion is made within the time required, it shall be presumed that all exceptions which have been duly taken, and noted in the bill of exceptions, are expressly decided by the court when the motion is overruled; but the exceptions must distinctly appear in the bill of exceptions, otherwise they will not be reviewed in this court. Nor will any exceptions be noticed here where no motion for a new trial has been made, or (what is the same thing) where none is made and filed within the time prescribed by law. It may be presumed that when the court below is thus formally called upon to decide expressly, and upon deliberation, on the points raised during the progress of the trial, errors may be corrected and new trials awarded, in many cases, without the delay and expense that must attend an appeal to this court.

The judgment is affirmed; and the Circuit Court of Wash-

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ington county is ordered to proceed with the execution of the sentence according to law. Judge Wagner concurs; Judge Lovelace absent.

ADOLPH PAPIN *et al.*, Appellants, v. PATRICK RYAN, Respondent.

Confirmation.—Papin v. Hines, 23 Mo. 274, affirmed.

Appeal from St. Louis Land Court.

A. Buckner, for appellants.

Shepley and Todd, for respondent.

HOLMES, Judge, delivered the opinion of the court.

The plaintiffs claimed title under a confirmation by the act of Congress of the 4th of July, 1836, and also by virtue of a confirmation under the act of Congress of the 13th of June, 1812, on the ground of inhabitation, cultivation, and possession, prior to the 20th day of December, 1803. The defendant claimed title under a patent from the United States, dated June 15, 1826.

On a comparison of these titles by patent and by a confirmation under the act of the 4th of July, 1836, in this case, when it was before this court on a former occasion, it was expressly decided that the title by patent must prevail over the other as against the plaintiffs. (Papin v. Hines, 23 Mo. 274.) We see no reason for departing from that decision; the ruling of the court below upon the instructions relating to this part of the case was in accordance with the previous decision, and must receive our sanction here.

In the same case, it was held that the confirmation claimed under the act of 13th of June, 1812, must rest upon an actual possession, this being the very ground of the grant by Congress in such case, and that such possession must be something more than a bare legal seizin to be inferred from a concession or survey only, and not merely an inferential

or constructive possession, "but an actual possession—*possessio pedis*." It was also held that an actual possession of the land lying east of the road, and held under the first concession, was not to be transferred and extended constructively to the land included in the new concession of 1799, without further distinct proof of an actual possession of the land contained in the additional concession also. On this question of possession, the court below gave the following instruction for the plaintiffs:

"If the jury find from the evidence that Joseph Brazeau, prior to the 20th day of December, 1803, actually inhabited, cultivated, or possessed, the tract of land described in plaintiff's petition in this cause, they will find for the plaintiffs."

The question of fact was then distinctly referred to the jury. The evidence offered to prove such actual possession of the land contained in the later concession and survey, and covering the land in controversy, prior to the 20th day of December, 1803, was certainly very slight, and indeed scarcely amounted to anything at all deserving of serious consideration on so weighty an issue. The particular acts proved in relation to cutting wood on the hill west of the road were nearly all subsequent to that date; and such of them as could in any way be referred to prior time, when taken in connection with the existing claim of commons in that region, the general custom and usage of the inhabitants with regard to cutting wood and timber, the other contemporaneous circumstances, and the actual condition of the country, cannot be considered as amounting to any substantial proof of the main fact of an actual possession of the land in question. The instruction which was given for the defendant on this point was fully justified by the nature of the evidence on which it was predicated. The several instructions which were referred for the plaintiffs, bearing upon this issue, were properly enough refused as being without any sufficient basis in the evidence, under the instruction which was given by the court on their behalf; the plaintiffs had the full benefit, with the jury, of the whole evidence (such as it was) on this subject.

The verdict was against them on the open question of fact, and no good reason has been shown for disturbing it now. It appears to have been fairly rendered, upon the merits of the case, under instructions which left the matter sufficiently open to their decision, and it must be allowed to stand.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.



DABNEY CARR, Respondent, v. ARCHIBALD CARR AND MORTIMER KENNETT, Appellants.

1. *Evidence—Copy.*—Before a copy of an instrument can be admitted in evidence, it must be shown that proper means have been taken to procure the original, and its absence duly accounted for.
2. *Conveyance—Notice.*—A lease, to give notice of its terms to third parties, must be recorded.

Appeal from St. Louis Law Commissioner's Court.

Suit upon covenants of a lease against assignee. [See opinion.]

Holliday, for appellants.

I. The court erred in admitting the lease offered in evidence.

1. Because it was no lease, not having been signed by the lessor until after the expiration of the term. An instrument is not a lease until signed by the lessor. (*Clemens v. Broomfield*, 19 Mo. 118.)

2. Because it was not a perfect original or duplicate, and because, also, the alleged perfect original, to Scannell, was not shown to be beyond the jurisdiction of the court, nor shown to be lost or destroyed. No process was taken out of the court to compel the production of the alleged perfect lease held by Scannell. All the testimony on this point is that of Webb, who said: "I made efforts to find the lease held by Scannell; that is, I looked for Mr. Scannell up-town where he used to live, but could not find him." No

notice was given to produce the Scannell lease; nor was any *subpoena duces tecum* issued for Scannell, so that the officers of the court could look for him. They might have found him—it was their duty—had proper papers been placed in their hands. (Lewin v. Dille, 17 Mo. 64; 9 Mo. 416.)

3. Because the said alleged lease was never acknowledged or recorded, and no actual notice of its contents was brought home to the defendants. (R. C. 1855, p. 358, § 16, & p. 864, § 42.)

II. The court erred in admitting in evidence the record of case of Dyer et als. v. Ridgway et als.

1. Because there was no allegation in the petition under which said evidence was competent. The petition does state that certain commissioners were appointed by the Land Court, but it does not allege in what case; nor does it allege that there was any decree or judgment of partition, nor between what parties.

Havens & Alexander, for respondent.

I. The lease was properly admitted in evidence. It is immaterial when Barlow signed the lease. If he had signed it on the day of trial, Scannell's contract would be none the less obligatory: he accepted the lease and enjoyed the premises.

II. The record from the Land Court was competent to show plaintiff's title to the fee in the premises in controversy, and in a collateral proceeding this court will hold that record as conclusive of the plaintiff's title.

The public record shows the fee to be in the plaintiff. The appellants, in levying upon and buying the premises at the marshal's sale, bought only Scannell's leasehold.

LOVELACE, Judge, delivered the opinion of the court.

The plaintiff's petition states that on the 10th day of May, 1855, Stephen D. Barlow, executor of William C. Carr, leased to one Roger Scannell a certain lot of ground in the city and county of St. Louis and State of Missouri, setting out the lease

verbatim. The consideration of the lease was twelve dollars and fifty cents per annum, to be paid semi-annually, and also that the lessee should pay all State, county and city taxes. The lease was to commence on the 1st day of July, 1855, and expire on the 1st day of July, 1861; and was made by virtue of a power granted to the executor in the will of William C. Carr. The petition then charges, that the Land Court of St. Louis county, in accordance with a decree, appointed commissioners to make partition of the estate of William C. Carr, and that the lot in question was assigned to the plaintiff by said commissioners, and that the report of the commissioners was duly approved by the Land Court. The petition further charges that the defendants obtained a judgment in the Law Commissioner's Court against said Scannell; that execution was issued on the judgment; that Scannell's interest in the lot in question was levied on, and sold to defendants on the 25th of October, 1859, and that they took possession of the lot and collected rent therefor.

The answer of the defendants denies any information or knowledge sufficient to form a belief as to all the material allegations in the plaintiff's petition.

On the trial, the plaintiff offered to read in evidence a paper purporting to be the lease from Barlow to Scannell. The defendant objected because the signatures were not proven; and the plaintiff called a witness by the name of Webb, who testified that Scannell signed the paper at the time it purported to be executed, and that Barlow's signature was genuine. The plaintiff's counsel then admitted that the paper was signed by Barlow in 1862, after the lease had expired, but before the commencement of this suit. Webb said he had tried to get the original lease from Scannell by going to the place where he formerly resided, but was unable to find him. The instrument was then admitted in evidence against the defendants' renewed objections.

Plaintiff then offered in evidence the record of certain proceedings in the St. Louis Land Court, in which Thomas B. Dyer et al. were plaintiffs and Joseph Ridgeway et al. were

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defendants, by which it appeared that partition had been made of William Carr's estate, and that the lot in question had been assigned to plaintiff by commissioners. The defendants objected to the reading of this record in evidence because it was not set out in the petition; but the objection was overruled and the record was read.

The plaintiff offered in evidence the marshal's deed to defendants and evidence tending to support his account for taxes.

The defendants asked several declarations of law, which were refused.

The case was tried before the court without the intervention of a jury, and a judgment given for the plaintiff. The defendants then filed their motions for a new trial and in arrest of judgment; which being overruled by the court, the case comes here by appeal.

Several errors by the court below are complained of, but, inasmuch as the discussion of a few points will reach the whole case, it will be unnecessary to take them up separately. The court erred in admitting the paper purporting to be a lease from Barlow to Scannell to be read in evidence. It was not a duplicate part of the original lease, for it was not signed by Barlow until after the lease had expired. At best it was only a copy, and no foundation had been laid for the introduction of secondary evidence. If Scannell was the person who likely had the lease, a subpoena *duces tecum* ought to have been issued for him requiring him to bring the lease in court; or, it ought to have been shown that he was out of the jurisdiction of the court, or could not be found; and if it was in the possession of the defendant, he ought to have been notified to produce it in court. (Lewin v. Dille, 17 Mo. 64.)

It was also incompetent for another reason: there was no privity of contract shown between the plaintiff and defendants, either by actual agreement or presumption of law. The deed of lease had not been recorded, as the law requires, so as to give notice to third parties, and thereby raise a privity

of contract between Barlow and all persons claiming under Scannell. And even if this had been done, it would be difficult to see how this would give the plaintiff a right to recover on a contract made with Barlow.

Barlow, it seems, had power under the will to lease the real estate of his testator; and, for all that appears either in the petition or evidence, Barlow, as executor, is entitled to this very money that the plaintiff is suing for; and if any privity of contract is to be inferred at all by the marshal's sale, it would be with Barlow and not the plaintiff.

In no view of the record, as it appears here, could the deed of lease be properly admitted.

With regard to the record from the Land Court, it was insufficiently pleaded; and the plaintiff ought either to have amended his petition, or the record ought to have been excluded.

In the view of the case we have taken, the instructions became immaterial, and it is unnecessary to discuss them.

The case is reversed and remanded, with leave to the plaintiff to amend his petition. The other judges concur.

CROW, MCCREERY & Co., Plaintiffs in Error, v. JOSEPH A. WEIDNER, Defendant in Error.

1. *Administration—Partnership.*—The surviving partner administering upon the effects of the partnership is obliged to account only for such effects and assets as actually come into his hands as surviving partner. Sec. 63, p. 125, R. C. 1855, has no application to the surviving partner, but to the administrator of the deceased partner, in respect to the excess of funds he might receive from the surviving partner upon such settlement.
2. *Administration—Partnership.*—Under the act R. C. 1855, p. 121, &c., the powers of the surviving partner are not changed or restricted, otherwise than that he is required to give security for faithful administration of the assets, and payment of the balance due after paying the partnership debts, &c.. He is not required to pay the claims presented *pro rata*, but may pay in full such as he sees fit.
3. *St. Charles Probate Court—Appeal.*—Under the provisions of the act establishing the St. Charles Probate Court, (Sess. Acts 1859-60, p. 13, § 3,) an appeal lies from that court to the Supreme Court.

36 412
54a 364
36 412
141 82
36 412
87a 576

Error to St. Charles Probate Court.

The defendant in error was surviving partner of the firm of Wiedner & Baare, and as such administered on the partnership effects. His second annual settlement was contested by plaintiffs in error, on behalf of themselves and other creditors of the firm. Defendant in error had charged against himself in the inventory, a book account against his deceased partner for \$680.88, and one against himself for \$648.92. The court allowed him a credit for the amount of these two accounts, as "unavailable," both the estate of the deceased partner and the surviving partner himself being insolvent. It appeared from the settlement and the record admissions of defendant in error, that claims against the partnership (including that of plaintiffs in error) had been regularly exhibited to the survivor for allowance and classification in the first class; that he had, nevertheless, wholly disregarded the classification and exhausted the assets of the concern in paying off *in full* a portion of the claims, leaving about \$9,000 of claims in the first class (including that of plaintiffs in error) without any payment or benefit whatsoever of the assets. It was urged by plaintiffs in error, that there should have been an apportionment *pro rata* of the assets among the claims exhibited in the first class. The court overruled this view, and declared the law to be, that the survivor was entitled to credits for all demands which he had *paid*, whether in the first or second class; provided, only, that the court be satisfied of the justness of such demands.

These points were settled by the court in the giving and refusing of instructions, to which exceptions were duly saved by plaintiffs in error.

E. A. Lewis, for plaintiffs in error.

I. The first declaration of law by the court, on its own motion, is erroneous. A claim in favor of an estate, against the administrator, is *assets* in his hands; and a surviving

partner, administering on the partnership effects, is subject to the same duties and responsibilities as an ordinary administrator. (R. C. 1855, p. 183, § 28; *id.* p. 125, § 65.)

II. The statute (R. C. 1855, p. 124, § 62) authorizing the surviving partner to pay off just demands, without waiting for their allowance by the probate court, goes no further than this. It does not nullify the next succeeding section (sec. 63), which, however, is rendered wholly inoperative by the effect of the instruction given. The law merely presumes that the surviving partner, from his interest in, and knowledge of the affairs of the concern, will not pay an unjust demand, and nowhere intimates a departure from those principles of equitable distribution which are established and adjusted by various other enactments. (R. C. 1855, p. 124, § 62; *id.* p. 125, §§ 63, 65; *id.* p. 152, § 5; *id.* p. 157, § 29; *Chouteau v. Consoue*, 1 Mo. 350.)

T. W. Cunningham, for defendant in error.

The court allowed these accounts as credits, not as unavailables, but as items wrongfully inventoried and charged against the surviving partner. Plaintiffs in error contend that they were debts due the intestate by the surviving partner, and support their position. (R. C. 1855, p. 183, § 28.)

The defendant in error contends—1. That he is not the administrator of the intestate. 2. That he, the surviving partner, is not indebted to the intestate; these accounts are not debts due by the surviving partner to the intestate; and, 3. That they are not assets in the hands of the survivor, neither would they be assets in the hands of the administratrix of the deceased (28 Mo. 186, *Bredow v. Mut. Sav. Inst.*) until an account taken and settlement made between the surviving partner and the personal representatives of the deceased partner, the debts and liabilities of the firm paid, and the balance struck, if any, and the surplus would be assets in the hands of Mrs. Baare, the administratrix of the deceased partner or intestate. (Sto. Part. §§ 346-7-8-9; *Gow. Part. ch. 5, § 2, p. 236; ch. 5, § 4, p. 352, 3d ed.*)

The rule is, "the stock is to be taken at the dissolution (at death for instance), and the proceeds until it is got in; and each is to be credited or allowed whatever he has advanced to the partnership, and to be charged with what he has failed to bring in, or has drawn out, more than his just proportion." (Sto. Part., note under sec. 347, and authorities there cited.)

As to the second point made by the plaintiffs in error, the defendant in error contends that the statute does not require the demands against the partnership effects, in the hands of the surviving partner, to be allowed and classified by the probate court. These debts are joint and several; the creditors may coerce the payment either from the surviving partner or from the executor or administrator of the deceased partner's estate. (Sto. Eq. § 676.) And when the survivor pays off demands against the firm, he is entitled to credit for the amount so paid, without allowance and classification. But when the surviving partner refuses to pay the debts of the late firm, and the executor or administrator of the deceased partner gives the additional bond and administers on the partnership effects, then the statute requires the demands to be presented, allowed and classified. (R. C. 1855, p. 125, § 62, Art. I., Admin. Law.)

HOLMES, Judge, delivered the opinion of the court.

The defendant, as the surviving partner of the firm of Weidner & Baare, gave bond and took charge of the partnership effects of the firm, for the purpose of closing up the affairs of the partnership, in accordance with the statute, and made a final settlement with the probate court of St. Charles county. In that settlement, he was allowed credits on his inventory, first, for a debt due by Baare to the firm at the time of his decease, and for a debt due by himself to the firm at the same time, both appearing to have been then individually insolvent; and, second, for all moneys made on executions on debts of the firm against the individual property of the survivor, or on garnishments of debts due the

firm ; and, third, for all uncollected and unavailable demands which had been inventoried as partnership effects ; and, fourth, for commissions and attorney's fees.

The plaintiff appeared at the settlement, and objected to the first credit allowed, and insisted further that his account was objectionable for the reason that in allowing and paying off the debts of the firm out of the partnership effects in his hands, he had paid them all in full, when he should have classed them and paid them only *pro rata*, as required by the 63d section of Art. I. of the Administration Act. (R. C. 1855, p. 125.) Neither of these objections can be sustained. The surviving partner was accountable only for the effects which actually came into his hands under his bond and charge as such surviving partner ; and the 63d section, above referred to, had no application to him, but only to the administrator of the deceased party's estate, in respect to the excess of funds which he might receive from the surviving partner upon such settlement. Under this act the powers of a surviving partner, in closing up the affairs of the partnership, are not changed or restricted, otherwise than as he is required to give bond and security that he will use due diligence and fidelity, and pay over the excess of funds in his hands that remains after satisfying the partnership debts and the costs and expenses of his administration ; but for any misconduct or neglect, there is a remedy on his bond. (Green's Adm'r v. Virden, 22 Mo. 511.)

His settlements with the probate court are of the nature of a judicial proceeding, and, like other settlements of the same nature, as those of administrators and guardians, they are judgments from which an appeal may be taken. Such an appeal comes within the language and intent of the act ; (§ 65 of Art. I., and § 9 of Art. VIII. ;) but the appeal must be taken to the Circuit Court. (§ 1 of Art. VIII.) By these provisions of the act, the right of appeal is placed on the same footing with an appeal from a settlement of an administrator. (§ 1, clause 2, of Art. VIII.)

It is contended on the part of the defendant, that a writ of error does not lie in such case from this court to the probate court. It was decided in *Matson v. Dickerson* (3 Mo. 339), that a writ of error would not lie from the Circuit Court to the county court, in matters of probate jurisdiction, where the statute only gave an appeal. Writs of error from the Supreme Court, upon any final judgment or decision of a Circuit Court, are in all cases writs of right. (R. C. 1855, p. 1294, § 1.) The "Act concerning administrators" only allows an appeal to the Circuit Court, and there is no statute which makes any provision for a writ of error directly to this court in such cases. We are of the opinion that the writ of error does not lie to this court.

This necessarily disposes of the case as it is now presented here; but we may take occasion to observe, that we have not discovered any material error in the action of the court below, either in making the settlement or in giving or refusing instructions.

The writ of error will be dismissed. The other judges concur.

Opinion of the Court on motion for a re-hearing. Judgment below affirmed.—HOLMES, J.

The plaintiff's counsel has filed a motion for a re-hearing in this cause, for the reason that an appeal or writ of error is given by special statute from the probate court of St. Charles county to the Supreme Court, and also for the reason that the court erred in the construction given to the 63d section of Art. I. of the "Act concerning administrators." (R. C. 1855, p. 125.)

The act of December 31, 1859, amendatory of "An act to establish the nineteenth judicial circuit and for other purposes," approved March 9, 1859, (Adjourned Sess. Acts of 1859-60, p. 13, §§ 1, 3,) creates a court of record to be called the St. Charles Probate Court, and provides for an appeal or writ of error in all cases of final judgment or decision of said court directly to the Supreme Court. Our

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attention was not called to this act on the hearing of the cause, and the existence of such an act was overlooked by the court.

We see no reason for changing the opinion heretofore given upon the construction and application of the 63d section of Art. I. of the "Act concerning administrators," above mentioned.

For the error in overlooking the special act in relation to the St. Charles Probate Court, the judgment of dismissal of the writ of error will be set aside, and, for the reasons expressed in the opinion heretofore filed in this case, judgment will be entered affirming the judgment of the court below. The other judges concur.



HATTY HIGGINS, INFANT, BY ELIZA HIGGINS, HER GUARDIAN,
Respondent, v. HANNIBAL AND ST. JOSEPH RAILROAD COM-
PANY, Appellant.

1. *Practice—Infant.*—A petition by an infant must show that the plaintiff is an infant, and sues by a guardian, or next friend legally appointed, or it will be bad on demurrer.
2. *Damages—Carriers—Railroads.*—The provision of the act (R. C. 1855, p. 647, § 2) relating to passengers dying from injuries occasioned by defects in the railroad or means of transportation, applies only to those transported or carried as passengers. Where the relation is properly that of master and servant, this particular clause of the act has no application. (See *ante* Schultz v. Pacific R.R., 18.) When the passenger by his own misconduct or negligence contributes to the injury, as by riding in the baggage car, contrary to the rules of the railroad, he cannot recover in case of injury.—R. C. 1855, p. 488, § 64.

Appeal from Hannibal Court of Common Pleas.

On the trial the appellant proved by J. T. K. Hayward, the general superintendent for the company, and his son, who was his clerk, that there had been notices put up inside the passenger coaches and on the baggage car of said train in 1859, and that they were up at the time of the accident;

36	435
40a	680
36	435
111	825
52a	894
53a	465

36	418
85a	450

that said notices, through accidents, had been all destroyed or lost; that he and his clerk had made diligent search for copies of said notices in all places where they had been, or were likely to be found, but that they had not succeeded in finding any copy of said notices. The appellant then offered to prove by secondary evidence the contents of these notices. The plaintiff objected to the introduction of such evidence. The court sustained the objection, and rejected the evidence as inadmissible, on the ground that it was improper, irrelevant, and had no bearing on the issue in this case; to which the defendant at the time excepted.

Defendant then offered to prove by witnesses that, at the time of the accident, notices were posted up in the baggage car, and also in the passenger cars of the train, on which said Higgins was at the time of the accident, in words and figures following: "No passengers are allowed to stand or ride on the platform of the cars, or in any baggage, wood or freight car; and any one violating this rule will do so entirely at his own risk.—J. T. K. Hayward, Gen'l Sup't." And thereupon the court sustained an objection, and rejected the evidence as inadmissible.

At the request of the respondent the court gave the following instructions to the jury:

1. By the answer in this case, defendant admits it was on the 16th day of September, 1861, the owner of the railroad, cars, locomotive, &c., named in the plaintiff's petition; and admits that Thomas G. Higgins, on the 16th day of September, 1861, was travelling on said railroad, and while so travelling on said railroad the said Thomas G. Higgins was killed, and did die from an injury received on the said railroad, and that his said injury and death was occasioned by a defect and insufficiency in said railroad. If the jury find from the evidence that the said Thomas G. Higgins, at the time of receiving said injury and death, was a passenger on said railroad, and that the plaintiff was and is the minor child of the said Thomas G. Higgins (and his only minor child), the jury will find for the plaintiff on the first count of plain-

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tiff's petition, and assess the damages at five thousand dollars, unless the defendant has shown to the satisfaction of the jury that the defect or insufficiency in said railroad was not a negligent defect or insufficiency.

2. In order to constitute the said Thomas G. Higgins a passenger on said railroad under the law, it is not necessary that he should actually have paid any passage money or fare : the defendant had the right to demand from him the fare or passage money paid by other travellers on said railroad, and if the defendant declined or neglected to collect said fare or passage money from said Higgins, the fact does not constitute the said Higgins less a passenger on said railroad.

3. If the jury find from the evidence that the said Thomas G. Higgins was lawfully upon the railroad of the defendant, and while on the said railroad his death was caused by the wrongful act, neglect, or default of the defendant, in the not keeping in safe and secure condition the said railroad or any part thereof ; and if the jury further find from the evidence that the plaintiff herein was, at the said date of said Thomas G. Higgins' death, and is his only minor child, then the defendant is liable to plaintiff in damages, and the jury will find for the plaintiff, and assess her damages at such sum as the jury may think proper, from all the evidence, not exceeding five thousand dollars.

4. If the defendant by its servants undertook to carry Thomas G. Higgins along the Hannibal and St. Joseph railroad, and while so conveying him along said railroad the said Higgins was injured and killed by means of a defect or insufficiency in any part of said railroad, or of any culvert on said railroad ; and if the jury believe from the evidence that the plaintiff is, and was, at the time of the said injury and death, the minor child of said Higgins, then the defendant is liable to the said plaintiff for the injury and death of said Higgins, caused or occasioned by said defect or insufficiency, although no compensation was to be paid to the company for conveying said Higgins.

5. Although the jury may find, from the evidence, that

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the said Thomas G. Higgins was, at the time of the injury and death aforesaid, travelling in the baggage car on said railroad, this fact will not preclude a recovery in this case, if the jury shall find from the evidence that said Higgins was in said baggage car with the knowledge of the conductor, and without objection from him, even though the jury may find from the evidence that said Higgins might or would not have been injured if he had been in the passenger car when the accident that resulted in his death occurred.

6. If the jury find from the evidence that the said Thomas G. Higgins was received into the cars of the defendant by the conductor of the train, and the train was a passenger train running for the carrying of passengers for hire, the law presumes that the said Higgins was received as a passenger, and as such he was entitled to all the privileges and rights accruing to any other passenger, unless the evidence shows to the satisfaction of the jury that he was received on said train as a hand or employee on said train to assist in working and running the said train.

7. Unless the jury find, from the evidence, that the said Higgins was in the employment of the defendant, and by virtue of said employment was bound to perform service, and entitled to wages from the defendant on the day and at the time he was killed, then said Higgins did not on said day stand in the attitude of a servant to defendant, nor of a co-servant with the employees, or co-servant conducting or managing the train on which the accident occurred.

To the giving of which instructions the appellant at the time excepted.

The defendant asked the court to give the following instructions to the jury :

1. If the jury believe from the evidence that Thomas G. Higgins was employed by the defendant to act as brakeman on one of its trains on its road, and on the morning of the 16th of September, 1861, he got into the baggage car of the defendant's passenger train bound west, and paid no fare, but acted and was treated as an employee by the conductor

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of said train; and when said train got out to the culvert at or near the seven-mile post on the defendant's road, the baggage car in which said Higgins was riding was precipitated from the track and down an embankment, and the said Higgins was thrown out of the car and killed, they will find for the defendant, notwithstanding they may believe from the evidence that said Higgins was not acting as such brakeman at the time of such accident, and notwithstanding the plaintiff was an infant, and only child of said Higgins.

2. If the jury believe from the evidence that Thomas G. Higgins was employed by the defendant to act as brakeman on one of its trains on its road, and on the morning of the 16th of September, 1861, he got into the baggage car of the defendant's passenger train bound west and paid no fare, and acted and was treated as an employee by the conductor of said train; and when the said train got out to the culvert at the seven-mile post on defendant's road, the baggage car was precipitated from the track and down an embankment, and said Higgins was thrown out of said car and killed, they will find for the defendant, notwithstanding they may believe from the evidence that said Higgins was not acting as such brakeman at the time of the accident.

8. If the jury believe from the evidence that Thomas G. Higgins was killed on the 16th of September, 1861, in consequence of a part of the culvert at the seven-mile post on defendant's road being defective by reason of an unusually heavy rain the night before having washed out the lower part of said culvert, and said defect could not be seen by the engineer in charge of the locomotive attached to the train while in the discharge of his duty; and they further believe from the evidence that said engineer was a safe, skillful and prudent engineer, and that he exercised reasonable care and skill in running his locomotive that morning, and in watching for defects and obstructions upon the track, they will find for the defendant.

4. If the jury believe from the evidence that Thomas G. Higgins was a passenger on defendant's train in the baggage

car, and shall further believe that the passengers were by the rules and regulations of the company prohibited from riding in the baggage car, and that said Higgins had notice of said prohibition at and before the time of the accident, and they further believe from the evidence that the defendant furnished sufficient room inside its passenger cars for the proper accommodation of the passengers, they will find for the defendant.

5. If the jury shall believe from the evidence that Thomas G. Higgins was not, at the time of the accident which resulted in his death, in the employ of the defendant; and shall further believe that, by the general rules and regulations of the defendant, its engineers and conductors were prohibited from admitting persons not in its employ to ride in the baggage car, and that said Higgins was aware of said rules and regulations, and was permitted to ride in the baggage car by the conductor without paying fare, and was killed while so riding, he was a wrong-doer. The permission of the conductor conferred no legal right, and the plaintiff cannot recover.

6. That if they shall find from the evidence that competent engineers were by the defendant employed to superintend and build that portion of the railroad at which the accident occurred, and they did superintend and direct the building of same, then the defendant was guilty of no neglect in the construction or building of the culvert in question.

7. If the jury believe from the evidence that there was neglect or want of care on the part of Thomas G. Higgins, which contributed to his death, the plaintiff cannot recover, and the verdict should be for the defendant.

8. If the jury believe from the evidence in the cause that Thomas G. Higgins, at the time of the accident, was in the baggage car, sitting in the front of, or standing near the south door thereof, and that the position occupied by Higgins was more dangerous than a position in the passenger coaches, and that said Higgins had been previously employed on defendant's road as an engineer and brakeman, and knew these facts, then there was negligence on his part which conduced

to the injury resulting in his death, and the verdict should be for the defendant.

9. If the jury believe from the evidence that the proximate cause of the accident described in plaintiff's petition, which resulted in said Higgins' death, was occasioned by the act of God, in sending down an unusual rain in the immediate vicinity of the culvert where said accident occurred, they will find for the defendant.

10. If the jury believe from the evidence that said Higgins paid no fare, and was passing on the railroad free of charge, in order to entitle the plaintiff, as his minor child, to recover damages, *she must prove gross negligence*, which is the omission of that care which even the most thoughtless take of their own conduct.

11. That if the negligence of the deceased in any manner contributed to cause the injury which resulted in his death, the plaintiff cannot recover.

12. If Thomas G. Higgins was an employee of defendant at the time of the injury which resulted in his death, the plaintiff must show by evidence that, prior to the accident, defendant had notice of the defect or insufficiency in the culvert.

13. Notice to an employee or agent of the defendant is not notice to the defendant, but plaintiff must show by proof that the president or directors, or some one of them, were, prior to the accident, notified of the defect or insufficiency.

14. If the jury believe from the evidence that the foreman of the section, on which was the culvert at which the defect or insufficiency complained of, was competent, careful and skillful, and that he went or sent some of his men over his section every day, and examined the track and road carefully on the Saturday before the accident, and discovered no defect or insufficiency in said culvert; and they further believe from the evidence that trains ran safely over said culvert the evening preceding said accident, and that an unusually heavy rain fell in the immediate vicinity of said culvert the night before said accident, and that the rain was not heavy

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in the city of Hannibal and its vicinity, and that said section foreman resided in said city of Hannibal, and that the lower part of said culvert washed out by said rain, leaving the top of the same and the superstructure standing apparently all right, and that the said Thomas G. Higgins was in the baggage car of the train, and said baggage car was precipitated from the track in consequence of the washing out of said culvert, and said Higgins was killed thereby, that the defendant exercised reasonable care and diligence in keeping its road and track in good order, and they will find for the defendant.

15. If the jury believe from the evidence that the culvert at which the accident in question took place was properly constructed for the purpose for which it was designed, and that it was in a safe and proper condition up to the evening preceding said accident; that the accident resulting in said Higgins' death was caused by the washing out of the lower part of said culvert by an unusually heavy rain the night before, and that the defect occasioned thereby was not visible to the engineer on the locomotive of the train that met with the accident, by the exercise of care and skill while in the discharge of his duty, such defect was not a negligent defect for which the defendant is liable, and they will find for the defendant.

16. If the jury believe from the evidence that the culvert described in the plaintiff's petition was in a safe and secure condition up to the night preceding the accident which resulted in said Higgins' death, and that the lower part of said culvert was washed out the during said night by an unusually heavy rain which fell in the immediate vicinity of said culvert, then said washing out of said culvert was not a negligent defect or insufficiency so as to render the defendant liable therefor, and they will find for the defendant.

17. If the jury believe from the evidence that the defect in defendant's road, which occasioned said Higgins' death, was not the result of negligence on the part of the defendant,

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and such defect was not a negligent defect or insufficiency, they will find for the defendant.

The court gave the 17th, and refused the other instructions.

The court, of its own motion, gave the following instruction in lieu of No. 16 :

"If the jury believe from the evidence in the cause that the culvert described in plaintiff's petition was in a *safe and secure* condition, and *free from any defect or insufficiency* as a culvert *up to the night preceding the accident* in question which resulted in the death of Thomas G. Higgins, and that the lower part of said culvert was washed out during said night by an unusually heavy rain which fell in the vicinity of said culvert, and which washing out did not result from any pre-existing defect or insufficiency of said culvert which reasonable skill and care on the part of defendant could have prevented or remedied, then they will find for the defendant."

To the giving of said instruction the defendant at the time excepted.

Carr, for appellant.

I. The respondent being an *infant*, *has no capacity to sue*, only in the mode prescribed in the Practice Act. (R. C. 1218-19.)

The point has been before the Supreme Court, and other courts of New York, frequently. They have held that an infant can only institute and prosecute a suit by a guardian appointed in conformity with their code ; and a suit instituted in any other way, even by a *next friend*, is irregular, and the defendant may make his objection at any stage of the proceedings, and when made it is the duty of the court to set aside the proceedings already had in the case. (*Hurlburt, &c.*, v. *Young*, 13 How. Pr. R. 413 ; *Tyler v. Smith*, *id.* 104 ; *Hoftailing v. Teal*, 11 *id.* 188 ; *Burnham v. De Bevooroe*, 8 *id.* 159 ; *Hulburt, &c.*, v. *Young*, 13 How. Pr. R. 413.)

The case of *Stanley v. Chappell* (8 Cow. 286) is precisely

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in point. The plaintiff described himself as guardian in the declaration, but a demurrer was sustained because he did not show "*how he was guardian, or that he was specially appointed by the court.*"

III. The respondent's father, Thomas G. Higgins, was an employee at the time of the accident which resulted in his death, and hence the appellant is not liable in damages for his death.

The principle of the common law is old and well established, that an employee cannot recover damages off the employer for injuries sustained by the negligence of a co-employee. (Farwell v. Boston & Worcester R. Corp. Amer. Railw. Cases; Murray v. South Car. R.R. Co., 1 McMullan, 385; Russell v. Hudson River R.R. Co., 17 N. Y. 134; Coon v. Syracuse R.R. Co., 1 Selden, 492; Boldt v. N. Y. C. R.R. Co., 18 N. Y. 432; Sherman v. Rochester & Syracuse R.R. Co., 17 N. Y. 153; McDermott v. Pacific R.R. Co., 30 Mo. 115; Gilshannon v. Stony Brook R.R. Co., 10 Cush. 228; Degg v. Midway Railw. Co., Hurl. & Norm. Excheq. R. 773.)

IV. But, if it shall be held that said Higgins was a passenger at the time of the accident which resulted in his death, then the appellant is not liable in damages therefor, for the reason that as a passenger he had no right to ride in the *baggage car*. (R. C. 1855, p. 438, § 54.)

The evidence shows that there were two passenger coaches in the train the morning of the accident, and but a few passengers; that there was not only room sufficient inside of said coaches for the respondent's father to ride, but there was ample room. The evidence offered by the appellant to prove that printed notices were posted up at the time in a conspicuous place inside of its passenger cars then in the train, and likewise in the baggage car, was relevant to the issue, and ought to have been received. These notices prohibited passengers from riding in the baggage car.

The 5th instruction given for the plaintiff entirely ignores that old and well established principle of common law, that when a party's own conduct contributes to the injury sus-

tained, he cannot recover, although the other party may have been guilty of negligence. (*Ernst v. Hudson River R.R. Co.* 24 How. Pr. R. 97; *Gahagan, Adm'x, v. Boston & Lowell R. R. Co.*, 1 Allen, 187; *Wilds v. Hudson River R.R. Co.*, 24 N. Y. R. 430; *Stevens v. Oswego & Syracuse R.R. Co.*, 18 N. Y. R. 422; *Brooks v. Buffalo & Niagara Falls R.R. Co.*, 25 Barb. 600; *Harding v. N. Y. & E. R.R. Co.*, 13 Barb. 9.)

Again: "It is incumbent upon the plaintiff to show, by *affirmative evidence*, that he was in the use of due care; and upon this point he has the burden of proof. (*Adams v. Carlisle*, 21 Pick. 146.) When, therefore, a plaintiff offers no evidence that he was in the exercise of care, but, on the contrary, the whole evidence upon which his case rests shows that he was *careless*, we have held that the court may rightfully instruct the jury as a matter of law that the action cannot be maintained. (*Lucas v. Taunton & New Bedford R.R. Co.*, 6 Gray, 64; *Gilmore v. Deerfield*, 16 Gray, —; *Gavett v. Manchester & Lawrenceburg R.R.* 16 Gray.") Cited from 1 Allen, 187.

The 12th instruction is based upon the principle that an employee cannot recover, unless the company, prior to the accident, had notice of the defect or insufficiency in the culvert. This instruction enunciated a correct principle, and ought to have been given. (*McMillan v. Saratoga & Washington R.R. Co.*, 20 Barb. 449; *Keegan v. Western R.R. Co.*, 4 Seld. 180.

Ewing & Harrison, for respondent.

If the deceased was lawfully upon the car at the time of the disaster, and the disaster and consequent injury and death were caused by a negligent defect or insufficiency in the road, then plaintiff is entitled to recover notwithstanding the circumstances relied upon by defendant as forming a defence to the action, namely, that deceased was in the baggage car at the time, and paid no fare.

I. The death having been the direct consequence of the defect in the road (as admitted by the answer), the law pre-

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sumes negligence on the part of the defendant. The degree of negligence is immaterial. (*Coggs v. Bernard*, 2 *Ld. Raymond*, 909; 1 *Smith's Lea. Cas.* 82, and cases there cited; *Philad. & Reading R.R. Co. v. Derby*, 14 *How. S. C.*, U. S. 485-86; *Thorne v. Deas*. 4 *Johns.* 84.)

Any negligent conduct which causes injury or loss is actionable. (*Amer. L. C.* 242; *McElroy v. Nashua L. R.*, 4 *Cush.* 400.)

Passenger carriers are bound to exercise the utmost care and diligence of very cautious persons, and of course they are responsible for any, even the slightest, neglect. (*Sto. Bail.* § 601.)

The distinction between *negligence* and *gross* negligence has been discountenanced in modern authorities as unintelligible. (*Wylde v. Pickford*, 8 *Mees. & W.* 460-61.)

The question as to whether the defect or insufficiency in the road was negligent or not, was fairly presented to the jury in the instructions given by the court at the instance of plaintiff, and in that given in behalf of defendant, and by the court on its own motion.

This is not a case to which the doctrine of contributory negligence applies; and if it was, the instructions asked by defendant on that point state the rule incorrectly. Several of them declare as a *conclusion of law*, that the fact of deceased being in the car in a certain position, &c., was negligence, and plaintiff could not recover. (*Lawrenceb. & Upp. Miss. R.R. Co. v. Montgomery*, 7 *Port., Ind.* 479.)

II. The sole issue made by the pleadings is, was the defect or insufficiency in the road a negligent defect? There is no *averment* in the *answer* of negligence on the part of the deceased which contributed to the accident.

III. But even if the issues were such as to raise the question of negligence as respects the deceased, and if it was in the power of defendant to limit or qualify its liability or responsibility as a carrier of passengers by any rules or regulations such as are referred to in the bill of exceptions,—still the deceased was in the *baggage* car by the permission of the

conductor, and therefore lawfully there, and none of the accidents of his situation can affect the right of plaintiff to recover. (Smith, Mast. & Serv. p. 157; Sleath v. Wilson, 9 Carr. & Pay. 607; 38 E. C. L. 249; Joel v. Morrison, 6 Carr. & Pay. 501; Croft v. Alison, 4 Barn & Ald. 590.)

A master is liable for the tortious acts of his servant when done in the course of his employment, although they may be done in disobedience of orders. (Phila. & Read. R.R. Co. v. Derby, *supra*; Penn. R.R. Co. v. McCloskey, 23 Penn. S. R. 526; Ohio & Miss. R.R. Co. v. Muhling, 30 Ill. 9; Gr. North. Railw. Co. v. Harrison, 26 Eng. L. & E. 446-7; 23 Penn. 526, & 14 How. 485-6, *supra*; Carroll v. N. Y., &c., R.R., 1 Duer, 571; 30 Ill. 9.)

If, in any view of the case, the rules spoken of in the bill of exceptions could have been read in evidence, the railroad company could not by any such rules excuse its own negligence.

The notices or rules contemplated by the statute are required to be posted up in the *passenger* cars. (R. C. p. 438.) Deceased was not in a passenger car, and there was no evidence that he saw them or had any knowledge of them. Besides, even if it can be supposed that he had any such notice, still he was not in the baggage car in *violation* of such rules.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff, an infant and only child of Thomas G. Higgins, who was killed while riding in a baggage car on the Hannibal and St. Joseph railroad, on the 16th day of September, 1861, brings this suit—the widow having failed to sue within six months—to recover the five thousand dollars damages which are given by the second section of the “Act concerning damages” (R. C. 1855, p. 647), where any passenger shall die from an injury resulting from or occasioned by any defect or insufficiency in any railroad. The petition is evidently framed upon that act, though the statute is not named or referred to by any express words. It contained two counts, one framed upon the second section and the other upon the

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third section of the act. The verdict was for the plaintiff upon the first count, and for the defendant upon the second count; and the damages were assessed at five thousand dollars. The defendant's motion for a new trial was overruled. The case comes up by appeal, and stands here upon the first count only.

There was no averment in the body of the petition that the plaintiff was an infant suing by guardian, nor that any guardian had been duly appointed, nor that Eliza Higgins was the mother and the natural guardian of the child, nor that she had given bond and security according to law as such natural guardian having charge of the estate of the minor. Averments of this nature are material, and should be made in the body of the petition. The title or caption of the cause should give the names of the parties to the action, and then they may be referred to in the body of the petition as the plaintiffs or defendants; but all necessary descriptions of the character of the parties, and all material allegations or statements of facts, must be contained in the petition itself, otherwise it will be demurrable. (Pr. Act, Art VI., § 3.) The incapacity of the plaintiff to sue here appeared on the face of the petition, and it was for that reason demurrable; where the defect does not appear on the face of the petition, the objection may be taken by answer; but if it be not taken either by demurrer or answer, it is waived, and will not be noticed on motion for a new trial or in arrest of judgment. (*Ibid.* 10.) This defect may be considered as having been cured also by the operation of the statute of jeofails. (§ 19 of Art. IX.) The result is, in such case, that the infant plaintiff will be allowed to recover judgment; but before the natural guardian would have any power or control over the money recovered, she should be required to give bond and security in the manner required by law in such cases. (*McCarty v. Rountree*, 19 Mo. 345.) A judgment will not be reversed on this ground alone.

The clause of the act on which this first count is framed relates exclusively to passengers and to cases of injury and

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death occasioned by some defect or insufficiency in the railroad. The statute makes the mere fact of an injury and death, resulting from a cause of this nature, a *prima facie* case of negligence and of liability on the part of the defendant as a presumption of law. It is not a conclusive presumption, but disputable by proof, that such defect or insufficiency was not the result of negligence; nor does it preclude any other defence of a different nature. The act is to be interpreted and construed with reference to the state of the law as it stood before its passage. By the general principles of law which were applicable to common carriers of passengers, and to persons standing in that relation, the fact of an injury to a passenger occasioned by a defective railroad, car or coach, or by defect in any part of the machinery, made a *prima facie* case of negligence against the defendant sufficient to shift the burden of proof; and, by that law, carriers of passengers were held responsible for the utmost degree of care and diligence, and were liable for the slightest neglect. This act is evidently based upon the same principles; it is confined by its terms strictly to passengers, and to injuries arising from causes of that peculiar nature only; and it must receive a construction in accordance with these principles. Viewed in this light, it is clear that the intent of this clause of the act was to provide greater security for the lives and safety of passengers as such, and to enable the representatives of a deceased passenger to pursue the remedy given by the act; and no other class of persons is included within its purview.

The first question presented here is, whether the deceased person was a passenger within the meaning of the act. The evidence shows that he had been in the employ of the company as an engineer and brakeman for several years, with some intermissions; that for several months previous to the accident, and down to the 4th day of September, 1861, when his train was stopped by *guerrillas*, he had been continuously on duty as a brakeman, and that, about that time, the interruptions occasioned by actual hostilities in that neighborhood had

caused the train on which he was employed to cease running for a time, and that for several days before the day of his death he had not been in actual service on any train ; but his name still remained on the roll of the company's employees as before. He had never been paid off and discharged ; his account was unsettled, and there were arrears still due him at the time of his decease. It appears that the brakemen were paid monthly, but at the rate of so much a day for as many days as they actually worked during the month. These facts would all go to show that his employment still continued, and that his relation to the company was still that of an employee. On the morning of the accident, he signalled the train to stop and take him up, as it passed where he was ; he took his place in the baggage car among other employees ; he appears to have treated himself as an employee, and he was received by the conductor as an employee who was passing from one point to another on the road, in the usual manner. He engaged no passage, took no seat in any passenger car, paid no fare, and evidently did not expect to pay any, and none was exacted from him. He did not claim to be a passenger, nor was he considered otherwise than as an employee by the conductor. Upon a careful examination of the evidence on this point, we think it tended to prove that he was an employee, and not a passenger, within the purview of the act, and that, under all the circumstances, the conductor had a right to presume that he was travelling as an employee of the company merely.

Such being the relation of the parties, the mere circumstance that he had been off duty as a brakeman for some days, or that he was then passing on his own private errand, and not immediately engaged on the business of the company, or in running that very train, cannot be allowed to make any difference. (*Gilshannon v. Stony Brook R. Co.* 10 Cush. 228.) The conductor, knowing him only as an employee, was not bound to inquire into his particular errand ; and though informed by a casual conversation with him, in the baggage car, that he was looking for some temporary em-

ployment, so as not to lose time, he might still be justified in treating him as an employee, who had the privilege of free passage on the trains as such. Under such circumstances, it was his business, if he claimed to be a passenger, to engage or take a seat in a passenger coach as such, or, at least, in some way, to make it known to the conductor that he claimed to be travelling in the character of a passenger. Where a director was invited by the president to pass over the road as a passenger, without paying fare (Philad. & Read. R. Co. v. Dertry, 14 How., U. S. 468); where a man was taken up by the engineer of a gravel train, to be carried as a passenger, paying fare, as the practice had been, and was allowed to go from the tender to a gravel car (Lawrenceb. & Upper Miss. R. Co. v. Montgomery, 7 Ind. 474); and where a man who had been a workhand on the road, but had left the service of the company, two weeks before the accident, because they did not pay him, got upon the train to be carried as a passenger (Ohio & Miss. R.R. Co. v. Muhling, 30 Ills. 9); and where a house carpenter was employed to build a bridge, and was sent by the company on their cars to another place, to assist in loading timbers for the bridge (Gillenwaler v. Madison & Ind. R.R. Co., 5 Ind. 340), the injured person was held to be clothed with all the rights and character of a passenger and a stranger, and that he was not to be considered as standing on the same footing as ordinary employees and fellow-servants of the company. If this party had been invited to go on the train as a passenger, or had taken a seat in a passenger car, or had been taken on board the train in the character of a passenger, and the conductor had merely waived his right to demand fare, as an act of liberality or courtesy, and had then allowed him to pass into the baggage car to ride there, the case would have been quite different, and might have fallen within the reasoning and the principle of these adjudged cases. The benefit of this act was plainly intended for those only who stand strictly in the relation of passengers, and between whom and the carrier there exists the privity of contract, with or without a fare actually paid,

and the peculiar responsibilities which are implied in that relation and depend wholly upon it. Where the relation is properly that of master and servant only, this particular clause of the act has no application. We think this matter was not fairly nor correctly laid before the jury by the instructions of the court below.

Again, even if the deceased party could be considered as having been in any proper sense a passenger, there could not be the least doubt that he had himself neglected all precautions, and voluntarily placed himself in a position which he knew to be the most dangerous on the train for a passenger. A baggage car is certainly no place for a passenger, and, as such, the proof shows he had no business to be there at all. We are aware that it has been held, in some cases, that if a passenger, who is travelling as such, is allowed to go into a baggage car, or into a part of the baggage car which is used for a post-office, where passengers are sometimes permitted to be, as in *Carroll v. N. Y. & N. Haven R.R. Co.* (1 Duer, 571), and while there an accident and injury occur by reason of negligence on the part of the company, and under such circumstances that his being in that place cannot be said to have materially contributed to produce the accident or injury, the defendant would still be held liable. In many cases of this kind, it might be difficult to determine whose negligence had been the real cause of the injury; but any question of this nature is removed from our consideration in this case by force of another statute, which finds an apt and just application here. By the fifty-fourth section of the "Act concerning railroad associations" (B. C. 1855, p. 438), approved one day only after the act in question, it is expressly provided as follows:

"In case any passenger on any railroad shall be injured while on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not

be liable for the injury: *Provided*, said company, at the time, furnished room inside its passenger cars sufficient for the proper accommodation of the passengers."

This provision is, by the fifty-seventh section of the same act, made applicable to all existing railroads in this State—(*ibid.* p. 438). Under this section, the exemption of the company is made to depend upon a violation by the passenger of the printed regulations posted up in the passenger cars only. They are not required to be posted up in a baggage car; it is presumed that no passenger will ever be found there. There was evidence in the case tending to prove that this provision of the statute had been complied with on the part of the defendant; but the printed forms used had been changed since that time, and no copy of the former cards had been found, and, on proof made of the loss of them, secondary evidence was offered to prove their contents. This evidence was excluded as irrelevant and as having no bearing upon the case. In the view we have taken of this statute, the evidence was certainly very material, and should have been admitted. It is true, such notices could have given this party no information, for the reason that he did not go into the passenger cars; the evidence tended to show that he was, in fact, well acquainted with these regulations; and this consideration, so far from weighing anything in his favor, would rather tend to strengthen the inference that he was not a passenger at all. This statute proceeds again upon the general principles of law in relation to contributory negligence; and it supposes that a passenger who has had the warning of this notice, and who still ventures to place himself in a situation so dangerous as a baggage car, is to be considered as contributing by his own negligence to produce the injury, and therefore that the company is not to be held liable in such case.

We think the first and second instructions asked for by defendant should have been given, and that the fifth, sixth and seventh instructions given for the plaintiff should have

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been refused. It is not deemed necessary more particularly to notice the other instructions.

The judgment is reversed and the cause remanded. The other judges concur.

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STATE TO USE OF CHARLES S. HEMPSTEAD, Appellant, v. FELIX
COSTE AND JAMES HARRISON, Respondents.

Administration—Judgment—Estoppel.—Hempstead v. Hempstead's Administrator, affirmed. Where no action can be sustained against the administrator, none can be maintained against his securities; and a judgment in favor of the administrator is a bar to a suit, upon the same subject matter, against the securities, as they are in privity with him.

Appeal from St. Louis Circuit Court.

Mumford, for appellant.

Glover & Shepley, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The same question is presented here that was passed on by this court in the case of *Hempstead v. Hempstead's Adm'r et al.*, (32 Mo. p. 134.) There, the suit was against the administrator Wilson, and judgment was given for the plaintiff in the Circuit Court; but that was reversed by this court, and final judgment entered for the administrator.

An attempt is now made to charge the securities on the administration bond, for what this court has heretofore determined the administrator was not liable. It is contended that the former judgment constitutes no bar or estoppel in this cause, because the securities were not parties to the record. The judgment, as it stands, is conclusive against the right of appellant in this action. The issue is precisely the same in this suit as it was in the former one; and the judgment of a court of competent jurisdiction is conclusive in a second suit between the same parties, or their privies, on

the same question, although the subject matter may be different. (*Doty v. Brown*, 4 Comst. 71.)

The present suit cannot be maintained without permitting the facts to be tried again and found the other way. The only thing for us to decide is, whether the parties to the two suits are the same, or stand in such privity as to permit the application of the rules or principles above enunciated. In the first suit the action was against Wilson the administrator, and Biddle; and by an examination of the record, which was in evidence in the cause, we see that the allegations in the petition, and the cause of action, are identical with those stated in the present suit. Both are founded on the mal-administration of Wilson, and his neglect or refusal to account for, and make the proper application of assets, which it is alleged had come into his hands. The securities were directly interested in the event of that suit.

It has been held that the relation of master and servant, principal and agents, constitutes such privity as would enable one of the parties to avail himself of a judgment rendered in favor of or against the other party on the same question. There ought not be two judgments directly in conflict on the same question, and that conflict can only be prevented by denying the appellant the privilege of controverting the judgment that has already been obtained against him.

It is not true that the term parties, within the meaning of the rule which renders a prior judgment conclusive on those who sustain that character, is restricted to those who appear as parties on the record. But, on the contrary, it includes all who have a direct interest in the subject matter of the suit; a right to make a defence or control the proceedings. (1 Greenl. Ev. § 523; *Duchess of Kingston Case*, 20 How. State Trials, 538; *Carver v. Jackson*, 4 Pet. 85-6; *Castle v. Noyes*, 4 Kernan, 329; *Bates v. Stanton*, 1 Duer, 79.)

The judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

 Bridge et als. v. Tierman.

HUDSON E. BRIDGE, JOHN N. BEACH, AND LEONARD B. HOLLAND, Defendants in Error, v. CHARLES TIERMAN, Plaintiff in Error.

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Action—Contract not to sue—Answer.—A covenant or agreement not to sue upon a claim, cannot be pleaded in bar of the prosecution of an action upon such claim. The remedy of the party is by an action upon the covenant or agreement. An answer setting up an agreement not to sue, presents no defence to an action.

Error to St. Louis Circuit Court.

Davis & Evans, for plaintiff in error.

I. The court erred manifestly in giving judgment for the plaintiffs below after it had continued the cause, no motion being made to set aside the continuance.

II. The answer of the defendant below stated a good defence to the prosecution of the action; for, although it is true that a covenant not to sue for a limited time has been held not to constitute a *bar*, yet there is no reason to say that such a covenant cannot be pleaded in abatement, to an action brought within the time named in the covenant. (*Clopper's Adm'r v. The Union Bank*, 7 Harris & Johnson, 103; *Cuff et al. v. Penn*, 1 Maule & Sel. 21; *Raymon v. Fisher et al.*, 6 Mo. 29; *Gerard et al. v. Whiteside*, 13 Ill. 7; 3d Tenn. 590; *Atwood v. Lewis*, 7 Mo. 395.)

Krum & Decker, for defendants in error.

The only defence contained in the answer is the promise made by plaintiff, that he would not sue until the termination "of the present civil war between the United States and the Confederate States." If this be a valid promise and the defendant has been injured by its breach, he may still have his action against the plaintiff, but it constitutes no defence to the note. The agreement to forbear is for an indefinite time—evidently a sham defence. (6 Mo. 392; 7 Mo. 462.)

Langsdorf et al. v. Field et als.

WAGNER, Judge, delivered the opinion of the court.

In *Atwood v. Lewis* (6 Mo. 392) and *Bircher v. Payne* (7 Mo. 462) this court decided that where a person gives his promissory note payable at a certain time, and the payee executes an instrument of writing that at the maturity of the note, on the happening of certain contingencies, he will extend the time of payment and forbear the collection of the money, that the happening of the events or contingencies mentioned in the writing will be no defence to the prosecution of a suit founded on the note; but that if the defendant is injured by the breach of covenant, he must resort to his action for damages.

The only thing that distinguishes those cases from the present one is, that the agreements that were there sought to be set up in defence were in writing, whereas it appears here that the agreement or understanding between the parties was merely verbal.

The court committed no error in giving judgment notwithstanding the answer, as, for aught that appears in the record, the defence would have been wholly inadmissible in evidence. No exceptions were taken or saved to the action of the court in overruling the motion for a continuance, and there is no error apparent on the record for us to notice.

The judgment will be affirmed. Judge Holmes concurs; Judge Lovelace absent.



MORRIS LANGSDORF AND ISAAC ROSENSTEIN, Appellants, v.
RICHARD R. FIELD *et als.*, INTERPLEADERS, Respondents.

1. *Evidence—Hearsay.*—The statements of one who is a competent witness at the trial are not admissible in evidence. The defendant in an attachment suit is a competent witness upon an interpleader for the property attached.
2. *Sale—Contract—Estoppel.*—A party claiming to be the owner of goods by purchase and delivery, is estopped by the levy of an execution in his favor upon the same goods as the property of the defendant in the execution.

Appeal from St. Louis Law Commissioner's Court.

This was an action of attachment brought by Langsdorf & Rosenstein against one William Meirand, and certain goods in his possession were levied upon, and Field Bros. claimed them by interpleader. The suit was originally brought before justice Grether, and was appealed to the Law Commissioner's Court, and there tried. On the trial, it was shown that on the afternoon of the 7th day of January, 1861, William B. Field, one of the claimants, with two clerks, went to the store of William Meirand, who was indebted to Field Bros., and took an inventory of the goods in the store. In the inventory, the articles were put down with the prices attached, but the amount thereof was not carried out. These persons remained at the store of Meirand until half past eleven that night, when the whole list was made out, the words "received payment" were written under it, and Meirand signed and delivered it there at his store that night to Field Bros. The inventory was then given to the book-keeper of claimants to extend the amounts, which he did the next day.

The evidence also showed that Meirand lived in the house over and at the rear of the store; that Meirand kept the key of the store and possession of the goods. There was no money paid, either by Field Bros. to Meirand, or Meirand to Field Bros. When the extensions were carried out, it was ascertained that the goods were worth about \$200 more than Meirand owed Field Bros.

It was also shown that Field Bros. obtained judgment against Meirand, on which an execution issued on the 8th day of January, 1861, which was levied by order of Field Bros. on the same goods that were included in the inventory made in part the evening previous. In the meantime, the attachment in favor of Langsdorf & Rosenstein was levied on a portion of these same goods; the debt of Meirand to Field Bros. was evidenced by notes on which judgment was rendered. Langsdorf & Rosenstein offered to prove

the statements of Meirand on the morning of January 8th, at his store, where the goods were, as to the ownership of the goods.

It was also shown that Meirand sold from this same stock of goods on the morning of January 8. The statements of Meirand were objected to by claimants, and the objection sustained. Plaintiffs also read in evidence a judgment in favor of Field Bros. and against Meirand, confessed on January 7, 1861, in the St. Louis Circuit Court, for \$1,157.83; also, execution on same issued January 8, 1861, and the sheriff's return thereon; that the same was levied upon the stock of goods included in the inventory, and that the sale was postponed by order of Field Bros.; also, another alias execution on the same judgment in which levy was made on the same goods, and the same sold by the sheriff to Field Bros.

The court gave the following instructions on behalf of the interpleaders:

1. If the jury believe from the evidence that Field Bros., interpleaders, before the attachment of Langsdorf & Rosenstein was levied, bought the entire stock of goods then remaining in Mirand's store, including the goods in dispute, and took possession thereof, and that the consideration of such sale was the payment of the indebtedness due from Mirand to Field Bros., then the jury should find for the interpleaders, although they may also believe from the evidence that the inventory of such stock of goods had not been completed.

2. Any acts committed by Meirand, or declaration made by him to others, are no evidence against Field Bros., the interpleaders, unless authorized or assented by them.

3. Fraud is not to be presumed in this case, but must be proved by the party alleging it, and the preferment of Field Bros. to his other creditors, unattended by other circumstances of fraud, will not authorize the jury to presume that the sale is fraudulent.

4. On a sale of personal property of the kind in contro-

versy, the purchaser has a reasonable time in which to take the property into his possession; and the jury are to judge what, under the circumstances, is a reasonable time.

To the giving of which the plaintiffs excepted.

The court, on motion of the plaintiffs, instructed the jury as follows, to wit:

1. If the jury believe from the evidence that, after the said bill of sale or inventory was made, the said goods were left in the possession of said Mirand, such possession remaining in him is *prima facie* evidence of a fraudulent sale, and, unless Field Bros. explain to the jury by evidence their reason for leaving said goods in his possession, then said possession becomes absolute evidence of fraud, and plaintiffs cannot recover.

2. In order to support their claim to the property in question, Field Bros., the plaintiffs in the interpleader, must show a sale and delivery of the property to them; and if the jury find from the evidence that any act remained to be done to constitute an absolute sale and delivery, then the plaintiffs cannot recover.

3. A mere contract to sell, without actual delivery of personal property, will not convey a valid title.

Plaintiffs asked the following instructions, which the court refused:

1. If the jury believe from the evidence that an inventory of the goods in the store of Meirand was made out and the prices attached, and that Meirand wrote under the same a receipt for the payment thereof, but that no payment was really made, and that Field Bros. did not cancel either their note against Meirand, nor the judgment obtained against him, but proceeded to make so much of their debt as they could out of the very goods set down in the inventory, or a part of them, and treated them as the goods of said Meirand, then they are bound by their said acts of levying and selling said goods, and cannot claim that they took them under said pretended bill of sale.

A motion for a new trial being overruled, plaintiffs appealed.

Knox & Smith, for appellants.

It is a well settled principle of law that the statements of a person in regard to the ownership of personal property, while he is in possession, may be given in evidence as a part of the *res gestæ*. (Thomas v. De Graffenvier, 27 Ala. 652; 19 *id.* 722; 17 Penn. 144; 4 Rich. 560; 26 Me. 107.)

The instruction offered by plaintiffs and refused by the court, embodies the whole law of the case. It should have been given to the jury for their further enlightenment. The instructions given for the interpleaders assume that the mere bargain to sell is a sale. Had Field Bros. bought these goods, and paid the money for them, the case would have been quite different; but here nothing was paid. They received nothing, they paid Meirand nothing, and there was no delivery. They did not even know the value of the goods; they did not know whether upon a settlement they would have to pay Meirand, or Meirand would have to pay them, to close up the account.

There was no sale, and the court should have instructed the jury that circumstances did not constitute a sale. (McBride v. McClelland, 6 W. & S. p. 94; Nicholson v. Taylor, 7 Casey, Penn. 180; Scott v. Wells, 6 W. & S., Penn. 366; 3 Barr. 50; 1 Casey, 208; 7 *id.* 180.)

Krum & Decker, for respondents.

I. The Law Commissioner's Court committed no error in refusing to give the appellants' instruction complained of. The instruction invokes the doctrine of estoppel in favor of a stranger. Estoppels must be mutual; what mutuality would there be to apply to this pretended estoppel? The doctrine of estoppel is, that where a party does an act, or makes a contract, upon the faith of which another is induced to change his position, the former shall not be allowed to gain-

say or controvert his former act. (1 Phil. Ev. 453, & notes, & 460 ; 4 Amer. Ed. Con. & H., notes.)

II. The declarations of Meirand, made the day after the sale, and in the absence of Field, were properly excluded by the court. The declarations of a party in possession are admissible only on the ground of declarations against interest. Meirand was a competent witness; he was no party to the issue tried, nor the agent of the party against whom the declaration was offered; his declarations are inadmissible. (8 Pick. 127; 2 Eng. 276; 10 Conn. 12; 15 John. 496; 4 B. & C. 325; 3 C. & P. 179; 10 Eng. Com. Law 345; 14 *id.* 261.)

WAGNER, Judge, delivered the opinion of the court.

We see no error in the ruling of the court excluding the declaration of Meirand; for aught that appears, he was a competent witness, and if his evidence was desired he should have been called on to testify. There was no evidence offered on behalf of the interpleaders to show a positive sale and delivery of the goods, though there was some evidence from which the jury might have deduced and inferred such sale, &c. The act of the parties in ordering the sheriff to levy on the goods under the judgment they had obtained against the defendant in the attachment, was a circumstance going strongly to show that there was no sale or delivery of the goods. The sale and the levy were two inconsistent acts. For a party to acquire an absolute title to goods by purchase, and the very next day have them levied upon by execution in his favor as the property of his vendor, is an absurdity.

The last instructions offered by appellants, and refused by the court, should have been given.

The judgment is reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

**THE MADISON COUNTY COAL COMPANY, Plaintiff in Error, v.
STEAMBOAT COLONA, Defendant in Error.**

1. *Boats and Vessels—Limitations.*—Suits, under the act R. C. 1855, p. 313, § 42, against boats and vessels upon running accounts for supplies, &c., must be brought within six months after date of the last item in the account.
2. *Boats and Vessels.—Lien.*—A party has a lien upon a boat for labor done and services rendered in getting out a boat and placing her in a position to begin her voyage, and in such cases there is none the less a lien because part of the service consisted in towing the boat.

Error to St. Louis Circuit Court.

Knight, for plaintiff in error.

I. The item for towing said boat is clearly within the second clause of the first section of the act. This clause gives a lien for "labor done" by "tradesmen and others in building, repairing, getting out, furnishing, or equipping thereof." But if there be any doubt of its being embraced in this clause, there certainly can be none that it is so embraced in the fourth clause of said section. This fourth clause gives a lien "for all demands accruing from the non-performance of any contract touching the transportation of persons or property." This contract was with the master and owner for towing the boat. The boat was to pay plaintiff ten dollars for towing said boat from the head of Bloody Island to the wharf at St. Louis. (*Smith v. St. bt. Raritan*, 10 Mo. 527; *Phegley v. St. bt. David Tatum*, 33 Mo. 461; *Farrington v. Meek*, 30 Mo. 378.) Towage is allowed in admiralty on the same ground of salvage or wharfage. (*Emerson v. Bark Pandora*, Newb. 434; 1 Conklin's Adm'y, p. 28, note.)

II. The account sued on was a *running account*. (*Phelps v. St. bt. Eureka*, 14 Mo. 532.) This contract to "let the account run, and for more coal," was beneficial to the boat; and the subsequent delivery of the coal would relate back to the time of the contract. The general doctrine of relation is, that when two or more acts concur to create an estate; the subsequent acts relate back to the original act. (18 Vin.

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Abr., tit. Relation, § 8, p. 290 et seq.; 1 Johns. Cas., 81; Jackson v. Ramsay, 3 Cow. 75.)

The difference between a running account and one that does not run is, that in the latter case each item (or those contracted for and delivered at one time) is a separate cause of action by itself. The minds of the parties are presumed only to have concurred as to the single transaction, and the same becomes an account stated as between the parties. In such case, the account bears interest. (2 Sto. Cont. § 1026; Carson et al. v. St. bt. Hillman, 16 Mo. 256; Taylor v St. bt. Rob't Campbell, 20 Mo. 254; Clark v. Humphreys, 25 Mo. 99; Pratt v. Reed, 19 How., S. C. 359; Newb. Adm. 111; 12 Mo. 477.)

Rankin, for defendant in error.

I. The demand accrued and the suit was brought within the county of St. Louis. Clearly the cause of action on the first two items was barred by the limitation of the statute. The case of Carson & Brooks v. St. bt. Dan. Hillman, 16 Mo. 256, is not applicable here, because the account (or demand sued on) in this case is not an open running account; from the face of the account, it would seem that separate contracts were made in reference to each furnishing, because different prices were charged for the several items. (St. bt. Mary Blane v. Beehler, 12 Mo. 477.)

II. In regard to the claim for towing, it is sufficient to say that such demands are not specified nor enumerated in the statute, and it cannot be made out a constructive supply.

HOLMES, Judge, delivered the opinion of the court.

This was a suit under the "Act concerning boats and vessels" (R. C. 1855, p. 303, § 1), upon the following demand:

Steamboat Colona Dr. to the Madison Coal Company.

1860. Feb. 21.	To 300 bush. coal, at 10 cts.	- -	\$30 00
" Mar. 16.	" 300 " " " " "	- - -	30 00
" Nov. 2.	" towing said boat and taking in lines	10	00
" " 6.	" 300 bush. coal, at 8 $\frac{1}{2}$ cts.	- - -	24 22
			<hr/> \$94 22

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The answer admitted the last item, but denied that there was any lien on the boat for the other items ; and upon the trial, the court instructing the jury to that effect, judgment was rendered for the plaintiff for the last item only. The statute provides that the suit shall be commenced within six months "after the true date of the last item of the account upon which the action is founded" (*ibid.* § 42); and it has been held by the court in several cases, that the time is to be reckoned from the date of the last item. (Carson v. St. bt. Hillman, 16 Mo. 256.) It is said there was an interval of more than six months between the second and third items, and that the lien for the first two items was lost by lapse of time. The evidence shows that the account was kept open at the instance of the master of the vessel, who expected that he would need more coal, and preferred to settle the whole bill at once. It appears to have been understood by both parties to be an open running account. The whole constituted but one demand, and the time should have been counted from the date of the last item. We think it came within the intent of the act and the decisions of this court.

As to the item for "towing said boat and taking in lines," there appears to be more difficulty. It is clear that it cannot be brought within the first, third or fourth clauses of the first section of the act. It is not for wages of a person employed as hand on board of the boat, nor is it any contract "touching the transportation of persons or property" on the boat. If it can be a lien at all, it must come under the second clause of the section ; and the only words which can be applied to it by any rational construction are these—"or on account of labor done by mechanics, tradesmen, or others, in the building, repairing, getting out, furnishing, or equipping thereof." It is not labor done in building, repairing, furnishing, or equipping the boat ; a liberal construction has been given to the act in respect to what constitutes the *equipment* of a boat, and it has been held that a barge, or a keel-boat, used to assist in the navigation of the vessel, in certain waters, is a part of her equipment, as a thing indispensable in navigating

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low stages of the river, and necessary in order to keep the vessel in employment. (*Ames v. St. bt. Louisa*, 9 Mo. 629; *Gleim v. St. bt. Belmont*, 11 Mo. 112.) But a tow-boat does not come within the category. When a steamboat is in such a condition as to require towing from one place to another, she cannot well be herself in a condition fit for navigating the river. If a boat had to be towed from Cincinnati to St. Louis, the labor to be done would not properly belong to a service in the navigation of the vessel itself, but would rather be an expense incurred by the owners directly for a service that does not come within any lien given by the act.

The other words are "getting out" the boat. Construed with reference to the building or repairing of a boat, they are broad enough to cover all those services or expenses which might be necessary to put her afloat when finished, and to place her in a situation that would enable her to begin her business of navigating the river. They are not necessarily to be confined to building or repairing. A boat may be laid up for a season and then brought out again. "Bringing out a boat" is a common phrase among boatmen; it is usually applied to the building of a new boat; it may also be understood as applying to a boat newly repaired, or newly brought out when merely laid up for a season; and the phrase "getting out" a boat may be taken in a similar sense.

This boat appears to have been laid up or moored at Bloody Island by lines fastening her to the shore, and the plaintiff was employed to take in the lines and tow her across the river to the wharf at St. Louis. This may as well be said to be a service in getting out the boat as if she been laid up for repairs. It seems to have been necessary in order to place the vessel in a situation to commence her voyage. Giving the words their evident signification, they may fairly be interpreted to include this item. We would not be understood as holding that there can be a lien under this act merely for the towing of a boat as such. The ground of the lien is the work and labor done by a tradesman or other person in getting out the boat and placing her in a position to begin her voyage

again, and in such case there would be none the less a lien because a part of the service consisted in a towing of the boat. Upon the evidence in this case, we think the particular service came within the terms and intent of the act; it follows that the instructions given for the defendant were erroneous.

The judgment is reversed and the cause remanded. Judge Wagner concurs; Judge Lovelace absent.



WILLIAM HAUSE, Plaintiff in Error, v. B. A. THOMPSON, R. F. BRIDWELL, — GRABB, AND HENRY L. BROLASKI, Defendants in Error.

Mechanics' Liens.—A party seeking to enforce a mechanic's lien upon a building must show that he furnished the materials for the building, under a contract either with the owner of, or the contractor for, the building.

Error to St. Louis Land Court.

Thompson purchased lumber from Bridwell & Grabb, in payment of which he accepted orders payable in brick. To satisfy his debt, he purchased brick of Hause, the plaintiff, which were delivered at the buildings erected by Bridwell & Grabb for the defendant Brolaski. Thompson not having paid the plaintiff, he filed his lien, which he sought to enforce by this suit. Thompson was served by publication, and failed to answer. The other defendants answered, denying any contract with the plaintiff for the purchase and delivery of the brick.

At the instance of the plaintiff, the court gave the following instruction:

1. If the court, sitting as a jury, believes from the evidence that Henry L. Brolaski was the owner of the premises described in plaintiff's petition, and that he contracted with R. F. Bridwell, or Bridwell & Grabb, to furnish brick; that said Bridwell contracted with defendant B. A. Thompson to furnish brick under the arrangement made by Bridwell, or Brid-

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well & Grabb, with Brolaski; that said B. A. Thompson purchased the amount of brick sued for from plaintiff, and had it delivered by plaintiff at said premises described in the petition, and the same were used in erecting said buildings, and that said plaintiff was never paid for said brick so delivered, then said plaintiff is entitled not only to a general judgment against said B. A. Thompson, but also to a special one against the said buildings, even although it may appear that said defendants Bridwell (or Bridwell & Grabb) and B. A. Thompson were paid in full for the material so delivered by Brolaski, the owner; it, of course, appearing that notice of lien had been duly served, and lien duly filed in time, and suit brought within ninety days after filing the lien.

At the instance of the defendants, the court gave the following instructions:

1. In order to recover in this action, and to bind the property of the defendant Brolaski, it is incumbent upon the plaintiff to prove that the defendant Thompson was a subcontractor under the defendant Bridwell for the erection of, or for the furnishing materials for the erection of the buildings described in the petition, and that the bricks were sold to Thompson and delivered to him upon the credit of the property accruing, from the fact that said Thompson was the contractor for the erection of said buildings, or for the furnishing materials therefor.

2. Unless the defendants Bridwell & Grabb were contractors under Brolaski either for the erection or for the furnishing of materials for the erection of the buildings in question, and, as such contractors, subcontracted with said Thompson to obtain the brick in question for the specific purpose of being used in the erection of the houses in question, the plaintiff cannot recover against Brolaski.

3. If the defendants Bridwell & Grabb have not been proven to the satisfaction of the court, sitting as a jury, to have been original contractors under Brolaski, and that said Thompson was a subcontractor under said Bridwell & Grabb

for the furnishing of materials or for the erection of the houses in question, the defendant Brolaski is not liable.

The court gave judgment for the defendants, including Thompson, and plaintiff appealed.

Peacock, for plaintiff in error.

Simmons, *Werner*, and *Billings*, for defendants in error.

WAGNER, Judge, delivered the opinion of the court.

The instructions given by the court stated the law correctly as applicable to the case made by the pleadings and the evidence, and we see no reason for disturbing the verdict rendered on the issue presented.

The record shows that Thompson bought the materials and received them, and the judgment will be reversed and remanded as to him, with leave to the plaintiff to amend his petition and pursue his remedy against Thompson if he sees proper, and affirmed as to the other defendants. The other judges concur.



STATE OF MISSOURI *ex inf.* ATTORNEY GENERAL, Plaintiff, *v.*
FOSTER J. McADOO, Defendant.

Constitution—Election—Office.—By the Constitution, Art. II, § 8, no vote can be counted for, nor any certificate of election granted to, any candidate who has not taken and filed the oath of loyalty within fifteen days next preceding the election. A certificate of election granted to one who has not thus taken and filed the oath is null and void.

Eaton, for plaintiff.

Drake, for defendant.

WAGNER, Judge, delivered the opinion of the court.

This is an information, in the nature of a *quo warranto*, filed by the Attorney General against Foster J. McAdoo, re-

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quiring him to show by what authority he exercises the functions and duties of the office of sheriff of Laclede county.

No answer has been filed in this court by McAdoo to the writ, which has been duly served and returned.

It appears from the record, that at an election held in Laclede county on the 5th day of September last, for sheriff of said county, the defendant and several other persons were candidates for the said office of sheriff, and that he received the highest number of votes cast, but had failed to take, file and subscribe the oath required of candidates by the Constitution of this State, within fifteen days next preceding the election.

By sec. 8 of Art. II. of the Constitution, no vote in any election by the people shall be cast up, nor shall any certificate of election be granted to any person who shall not within fifteen days next preceding such election have taken, subscribed and filed said oath.

McAdoo, having omitted to comply with the requirements of the Constitution, was ineligible; and the casting up the votes, and issuing the certificate to him, were acts unauthorized by law, and null and void. We are of opinion, therefore, that, in exercising the rights and privileges, and receiving the emoluments of said office, he has been guilty of usurpation, and we accordingly adjudge that he be ousted therefrom.

Having no evidence that he acted from any other than mistaken views, we forbear imposing any fine on him, and only order that he pay the costs. Judge Holmes concurs; Judge Lovelace absent.

STATE OF MISSOURI *ex inf.* ATTORNEY GENERAL, Plaintiff, v.
FOSTER J. MCADOO, Defendant.

Constitution—Office—Appointing Power.—Under the Constitution, the Governor has not the power to fill by appointment a vacancy in the office of sheriff occurring after the Constitution went into effect. Such vacancy must be filled in the manner provided in Art. IV., §§ 23 & 24.

Eaton, for plaintiff.

Drake, for defendant.

WAGNER, Judge, delivered the opinion of the court.

The only question involved in this proceeding is as to the legal sufficiency and validity of the appointment of the defendant as sheriff of Laclede county, by the Governor, on the 6th day of November, 1865, to fill the vacancy occasioned by the death of Harris, the previous appointee. By an ordinance passed by the State Convention March 17, 1865, providing for the vacating of certain civil offices in the State, filling the same anew, &c., the office of sheriff was vacated, and the Governor was empowered to fill the same, by appointment, for the remainder of the term. In pursuance of this power, the Governor duly appointed and commissioned one R. B. Harris as sheriff of Laclede county, who entered upon the discharge of the duties of his office, and died on the 17th of May thereafter. On the 7th day of August, 1865, the county court of Laclede county, in accordance with sec. 23 of Art. V. of the present Constitution, proceeded to fill the vacancy in the office by temporary appointment, and ordered a special election for supplying it for the remainder of the term.

The defendant in this proceeding does not claim title to the office by reason of that election, but by virtue of the appointment and commission of the Governor in the ensuing November.

It has been contended here that the ordinance conferring the power of appointment on the Governor did not restrict him to the first exercise of the appointing power, but continued and would authorize the filling of any vacancy, which might occur, up to the end of the term for which the previously ousted incumbent was elected; and that if this position were untenable, then the question here must be governed by sec. 24 of Art. IV. of the Constitution of this State, which was in force when the vacancy happened, and which gave the executive the undisputed right to appoint.

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We do not see on what principle this position is maintainable. The present constitution, when it took effect on the 4th of July last, was from that date the supreme law of the land, and applied to all subjects of this nature not specially exempted from its operation. The old constitution was entirely superseded by the new, and its authority or power cannot be invoked in this matter. The ordinance and the constitution were formed by the same body and at the same session, and, to arrive at their true interpretation, must be construed together. The ordinance gave the Governor power to fill by appointment, for the remainder of the term, the vacancies created in the respective offices.

It does not appear that it was contemplated the appointing power should be exercised only for the purpose of filling the vacancies created by the law, and also vacancies which actually existed at the time of the passage of the law. But what would seem to make the intention manifestly clear, is the fact that it is provided in the constitution the manner in which offices shall be filled where vacancies occur, and no exception is made; vesting the appointing power in the Governor, for the residue of the term, only in one instance.

In Art. VI., sec. 16, it is declared that the provision requiring an election to be held to fill a vacancy in the office of the judges of the Supreme and Circuit Courts shall have relation to vacancies occurring after the year 1868, up to which time any such vacancy shall be filled by appointment by the Governor. This express exception must be taken to exclude all others, and leads to the conclusion that all other vacancies were intended to be filled in the mode prescribed in that instrument.

The result is, that the appointment under which the defendant holds his office *was* void, and judgment of ouster will be entered against him in this court, with costs. The other judges concur.

CITY OF ST. LOUIS TO USE OF JAMES CREAMER, Respondent, v.
OTTO CETERS, Appellant.

1. *City of St. Louis—Sewers—Special Tax.*—Under the provision of act of March 14, 1859, (Sess. Acts 1858-9, p. 168,) the City of St. Louis has authority to direct district sewers to be made whenever the city council shall consider such sewers necessary, without a petition from a majority of the property owners or the recommendation of the board of health.
2. *City of St. Louis—Special Tax—Evidence.*—By the provisions of the act of Jan. 16, 1860 (Sess. Acts 1859-60, p. 382), the special tax bill, certified by the city engineer, is *prima facie* evidence of the liability of the person therein named as the owner of the property.
3. *Constitution—Evidence.*—It is competent for the Legislature to change the rules of evidence, and prescribe what shall be the effect of evidence in future suits, as well as to change the remedy.

Appeal from St. Louis Circuit Court.

This suit was for building a sewer, brought on a special tax bill certified by Truman J. Homer, city engineer, "that the charge against the property in the bill described is correct and in accordance with § 14 of 'An act amendatory of and supplementary to the several acts incorporating the City of St. Louis,' approved March 14, 1850, and also § 4 of 'An act supplementary to the several acts incorporating the City of St. Louis,' approved January 16, 1860. The receipt attached, signed by James Creamer, contractor, will cancel the charge against the property named above." Dated July 26, 1860.

The suit was brought under ordinances Nos. 4508 and 4635 of the City of St. Louis, and under § 14 of an act of the General Assembly of the State of Missouri, entitled "An act amendatory of and supplementary to the several acts incorporating the City of St. Louis," approved March 14, 1859. The amount claimed was \$104.45.

At the trial the plaintiff proved the signatures to the certified special tax bill, also those to contract No. — of the files in the city engineer's office, whereby James Creamer purports to contract with the city for building a sewer in "West First street sewer district, north of Poplar street," to be finished 1st April, 1860, and then offered the same in evidence; to

both of which the defendant objected, which objection the court overruled, and they were received in evidence. Plaintiff also offered said ordinances and act of the General Assembly, as well as § 4 of an act of said General Assembly supplementary to the several acts incorporating the City of St. Louis, approved January 16, 1860, which, under like objections, were submitted by the court.

It was proved that said Homer had not charge of the work on the sewer, but that one Vokrath, a deputy city engineer had, and that said Homer knew nothing whatever of the quality, quantity, or character of the work; also, that there was a natural drainage of the surface of said district; also, that the sewer was not petitioned for by any property holders of the district. It was admitted that the board of health had not recommended the construction for sanitary purposes; and it was offered to prove that the work was inadequate to the purpose of a thorough drainage of the district: that it did not thoroughly drain the property of the defendant, and that it was unnecessary; which the court excluded.

It was also in proof that James Creamer did not do the re-paving, iron, and cut-stone work; that in this bill the re-paving, iron, and cut-stone work was charged; that the latter items were done by other parties, under different contracts.

The "West First street sewer district, north of Poplar street," was established by ordinance No. 4508, August 12, 1859. "North Poplar street sewer district No. 3" was established by ordinance No. 4635, March 24, 1860. and is a subdivision of "West Main street sewer district." Judgment was rendered for \$139, bearing 15 per cent. interest per annum, and declared a lien on the property.

Spies, for appellant.

I. The act directing the assessment of the costs of the sewer, as a special tax against the lots in the district in proportion to the area, &c., is unconstitutional—contrary to § 19 of art. 18 of our State Constitution, which re-

quires all taxation to be in proportion to the value of the property.

II. There is no ordinance authorizing the construction of this sewer.

1. Ordinance 4508 authorizes and directs sewers to be constructed in West First street sewer district, north of Poplar street; but this suit is for a sewer in "North Poplar street sewer district No. 3."

2. Ordinance 4635 only authorizes to be constructed sewers in North Poplar sewer district No. 3, on two conditions, viz.: First, that the property holders have, or shall petition therefor; or second, that the board of health shall recommend it for sanitary purposes.

Neither of which had been done.

III. The ordinances, even if they were supposed to authorize this sewer, are defective.

1. No. 4508 cannot authorize the construction of this sewer before either a majority of the property holders of the district shall have petitioned therefor, or before the same shall have been deemed necessary for sanitary or other purposes. See p. 168, § 14, Laws of Mo., 159—all of which must affirmatively appear of record. *Judson v. City of Bridgeport*, 25 Conn. 426; also dissenting opinion of C. J. Church and J. Storrs in *Nichols v. Bridgeport*, 23 Conn. 213, and p. 208. But, instead of this appearing, the contrary was proved.

2. The ordinances must define the number of sewers to be constructed, their location, and, above all, their dimensions, (see same act of 1859,) which neither of said ordinances does.

IV. The tax bill is not *prima facie* evidence.

1. The law does not make it so; § 4, p. 383 of Acts 1859 and 1860 does not, for it is nothing but a blunder, referring to sections in a confused manner, and to words and lines not corresponding with the sections it refers to.

2. The work for which it purports to be was not done in the district stated in the tax bill, nor under contract for such work.

3. The pretended contract was made before this district was established, and this district, according to the ordinance, is no subdivision of the district for which the contract was made; and even if it were, it was not shown that such subdivision was made before the work was begun, as is required by said act of 1859, p. 168.

4. The tax bill is not good as *prima facie* evidence, for the act of January 16, 1860, is not relied on or pleaded in the petition.

V. At all events the tax bill is not more than *prima facie* evidence, and the same was fully disproved—Homer himself proving that he had no knowledge of the facts which the certificate implies. Hence the bill is to be regarded as one without a certificate, and as such no evidence, and there is no other proof of plaintiff's claim.

VI. Vokrath is the only person who could have made the certificate. The law contemplates that the person alone who has knowledge of the facts shall certify the same.

VII. The certificate is too general. It should state facts, not conclusions.

VIII. A thorough drainage of the district being a condition of the defendant's liability, both by said act of 1859 of the General Assembly of Missouri and said ordinances, proof that the sewer did not effect a thorough drainage should have been admitted.

IX. If the act of the General Assembly of Missouri of Jan. 16, 1860, (Laws of 1859 and 1860, p. 388,) were applied to this cause, such application would be retrospective; for the contract relied on was made Dec. 1, 1859, and said law went only into force April 17, 1860, and by contract the work was to be finished April 1, 1860. "It is a rule never to apply a statute retrospectively by mere construction. If not retrospective in its terms, or ambiguous in relation to its effects and application to past events, courts must consider it prospective merely." (Jarvis v. Jarvis, 8 Edwards, 462, and cases there cited; Warren Man. Co. v. Aetna Ins. Co.,

2 Paine, U. S. C. C. 501.) It is similar with ordinance 4685, which was passed March 24, 1860.

X. The judgment should not have been for the lien on the property, nor for 15 per cent., as the charge in the bill is one item, and some of the work, &c., done, not under Creamer's contract, nor done by him. (*Edgar v. Salisbury*, 17 Mo. 271.)

Mauro, for respondent.

I. This is an action on a tax bill issued by the City of St. Louis under the provisions of an act entitled "An act amendatory of and supplementary to the several acts incorporating the City of St. Louis," approved March 14, 1859. (Acts of 1859, p. 165; Rev. Ord. of 1861, p. 213.) By the terms of that act the City of St. Louis has full authority to establish sewer districts at pleasure; to subdivide, enlarge or change the same by ordinance at any time before the construction of a sewer therein, and to cause sewers to be constructed therein whenever the common council shall see fit. (See § 14.)

II. By the terms of an act entitled "An [act] supplementary to the several acts incorporating the City of St. Louis," approved Jan. 16, 1860, (see Rev. Ord. p. 228, § 4; Session Acts of 1860, p. 383, § 4,) section 14 of the act of March 14, 1859, is so amended that the special tax bill therein authorized to be issued is made *prima facie* evidence of the validity of the charge against the property, and the liability of the person named as the owner thereof.

The burden of proof, then, lies upon the defendant in this case to establish a valid defence to the action, which has not been done or attempted.

III. All other points in this case have been fully settled by the Supreme Court, in various decisions. (*Lockwood v. City*, 24 Mo. 20; *Palmyra v. Morton*, 25 Mo. 598; *Egyptian Levee Co. v. Hardin*, 27 Mo. 493; *City of St. Joseph v. Anthony*, 30 Mo. 539. See authorities referred to in *Lockwood v. City*, cited above.)

HOLMES, Judge, delivered the opinion of the court.

This was a suit upon certified special tax bills for the cost of construction of a district sewer in the city of St. Louis, under the act of March 14, 1859. (Laws of 1858-9, p. 168, § 14.)

By this act, the city has power by ordinance to establish a general system of sewers, to consist of public, district, and private sewers. District sewers are to be established within the limits of districts to be prescribed by ordinance, and the districts may be subdivided, enlarged and changed, by ordinance, at any time previous to the construction of a sewer therein. The common council is authorized "to cause sewers to be constructed in each district, whenever a majority of the property holders resident within the district shall petition therefor, or whenever the council may deem such sewer necessary for sanitary or other purposes," to be made of "such dimensions as may be prescribed by ordinance"; and as soon as such district sewer shall have been fully completed, the city engineer, or other officer having charge of the work, is to compute the cost of the work and assess it as a special tax upon the lots of ground in proportion to the area of the whole district, and the certified bill is to be made out against the lot in the name of the owner, and delivered to the contractor for the work, to be collected by him by ordinary process of law in the name of the city, to his own use; and the certified bill is to be a lien on the lot.

The power of the city to order the construction of a district sewer is not limited to cases of a petition by a majority of the names, or of a recommendation of the board of health, for sanitary purposes, but extends to all cases where the council shall deem a district sewer necessary for any other purpose. And when the council has, by ordinance, expressly authorized such sewer to be built, it is to be presumed that it was deemed necessary for some purpose, and of that matter the council is to determine for itself. It does not concern the defendant here.

By ordinance dated the 12th of August, 1859, the "West 30—VOL. XXXIV.

First street sewer district" was established, and the city engineer was authorized to cause a district sewer to be constructed therein. On the first day of December thereafter a contract was made with the plaintiff, Creamer, for the construction of the sewer in question, and the work proceeded. Afterwards, on the 24th of March, 1860, this district was subdivided by ordinance into two, this sewer falling within the second, on "North Poplar street sewer district No. 3," and by this ordinance the city engineer was authorized to cause district sewers to be constructed therein in all cases where a majority of the property owners shall have petitioned therefor, or when the board of health shall have recommended a sewer therein for sanitary purposes. This ordinance could have no retrospective operation upon the previous contract. Whether or not it came within the power given by the act, can have no importance for the defendant here.

By the fourth section of the act of January 16, 1860, which went into force on the seventeenth day of April following, the fourteenth section of the previous act was amended by adding after the words "until paid," a clause which made the certified tax bill, in any action brought to recover the amount thereof, *prima facie* evidence of the validity of the charge against the property therein described, and of the liability of the person therein named as the owner of the property." (Laws of 1859-60, p. 382, § 4.) The section as printed (evidently by some misprint or clerical mistake) places the amendment in the "twenty-ninth" instead of the thirty-ninth line of section "nineteen" instead of "*fourteen*," as it should be; but notwithstanding their errors, there is enough clearly to designate both the section and the place in the section where the amendment is to come. There is nothing in this that can avail the defendant in his defence.

The certified tax bill was made out and dated the 26th of July, 1860, after the work was completed, and in conformity with the act under which the contract was made and the

work done. The previous amendment of the act has the effect only to make the bill *prima facie* evidence, when it would not have been such evidence before the amendment.

There can be no doubt it is competent for the Legislature to change the rules of evidence, and prescribe what shall be the effect of documentary evidence of this kind in all future suits, as well as to change the remedy. It cannot be considered as inapplicable to the present case, or as inoperative upon third parties by reason of any *retroactive* character. So far as it may have any such retrospective operation, it came within the power of the Legislature to change the law in such matters.

The cause of action accrued after the amendment was made: it does not change the rules of decision of a civil cause, upon facts existing previous to the making of the law, and relating to the grounds of the action or of the defence. (Woart v. Werneck, 3 N. H. 973; Smith, Const. Law, §§ 155, 168, 381, 368.)

It is objected by defendant that the ordinance did not prescribe the dimensions of the sewer. The act gives the council power to prescribe the dimensions, and the ordinance authorizing the city engineer to construct the sewer, gave him power to determine the dimensions of this particular sewer. It is not made a condition precedent either of the power of the council or of the authority of the engineer. We do not see that this objection can be of any avail to the defendant.

It is insisted further that the city engineer had no authority to certify this particular bill, for the reason that the work was done under the immediate charge of another person, who was employed in his department and was acting under his authority. The city engineer is to be considered as having charge of all work done under his authority in his department. He is supposed to be acquainted with whatever is done under his direction; and the bill, when certified by him, is to be *prima facie* evidence only. The defendant may rebut it by disproving any material fact, or the correctness

of the bill ; but the mere circumstance that the engineer does not know of his own personal knowledge all the details of the bill, or that the work was not actually done under his eye, can be of no importance in the matter.

Exception was taken, also, to the admission of a certified bill made out in the name of John Weinhamer, to be discharged by the receipt of the plaintiff Creamer. This bill appears to have been for the same amount as that certified in the name of Creamer, for which the judgment is given. This bill, in the name of Weinhamer, was certainly not admissible under the petition as a bill against the defendant ; but it does not appear to have had any effect upon the verdict, and must have been regarded as irrelevant or immaterial. It seems to have been offered under an agreement of counsel in reference to another case, and in connection with other evidence tending to show that some of the items of the work were done by other mechanics under some arrangement with the plaintiff, whereby he was to have the benefit of their contract with the city in the matter of the price, and the whole was to be included in the certified bill in his favor ; and he was to be accountable to them. It amounted to nothing more than a sort of sub-contract under Creamer, for certain parts of the work ; and it is not apparent how it could have been of any disadvantage to the defendant. We see no ground here for reversing the judgment.

The question raised as to the unconstitutionality of the act in respect to the mode in which the tax is levied, has already been decided by this court in several cases. (*City of St. Joseph v. Anthony*, 30 Mo. 539 ; *Egyptian Levee Co. v. Hardin*, 27 Mo. 493 ; *Lockwood v. City*, 24 Mo. 20.)

There were some other objections made by the defendant, which we do not think it necessary to notice in detail. The judgment appears to have been given for the right party, and we have not found any such error as would warrant a reversal.

Judgment affirmed. Judge Wagner concurs ; Judge Lovelace absent.

City of St. Louis to use, &c., v. Rudolph.

CITY OF ST. LOUIS TO USE OF GEORGE J. DECKER, ASSIGNEE OF
URSULA BUOL, ADM'X OF P. BUOL, DEC'D, Respondent, v.
WILEY RUDOLPH, Appellant.

36 465
37a 463

1. *Jurisdiction—Justices' Courts — Law Commissioner.*—Justices of the peace and the Law Commissioner's Court for St. Louis county have no jurisdiction to enforce a lien upon real estate to secure the payment of a special tax for the improvement of streets and alleys, under the charters and ordinances of the City of St. Louis.
2. *Practice—Parties.*—The assignee of the contractor may sue in the name of the City of St. Louis to his use, under the act of March 6, 1855, p. 25, authorizing a special tax to be enforced by proceedings at law.

Appeal from St. Louis Law Commissioner's Court.

Peacock, for appellant.

I. The justice's court in which this suit was originally brought had no jurisdiction of the cause of action. It is remarked, first, that justices' courts have no jurisdiction except what is conferred upon them by act of the Legislature. (*Williams v. Bower*, 26 Mo. 601.) Under the general law, none but courts of record can enforce liens or claims against realty.

The act creating the Land Court, approved December 12, 1855, gives that court exclusive original jurisdiction.

Gottschalk, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This was a suit upon a certified tax bill for paving an alley in the City of St. Louis, under an act entitled "An act supplementary to the several acts incorporating the City of St. Louis," approved January 16, 1860, which provided that the contractor for the work, to whom the certified bill should be delivered, when made out and certified by the city engineer, should proceed to collect the same "by ordinary process of law," in the name of the city to his own use. The previous act of March 5, 1855, had provided that "such lien may be enforced by a special tax, levy and sale, or also by proceed-

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ings at law. It was not specified in what courts the suits should be brought. The act establishing the St. Louis Land Court (R. C. 1855, p. 1592) gave that court exclusive original jurisdiction "for enforcing every right, claim, demand, or lien," upon real estate. It contained a proviso, that the jurisdiction thereby conferred should "not take away the jurisdiction in like matters conferred on justices of the peace, the Law Commissioner's Court, or Probate Court of said county." The acts defining the jurisdiction of the justices' courts and the Law Commissioner's Court do not confer on them, or either of them, any jurisdiction for enforcing liens upon real estate. The act of 1859, which gave a concurrent jurisdiction in such matters to the St. Louis Circuit Court and Court of Common Pleas, until it was repealed in 1864, did not include the Law Commissioner's Court. At the time when the suit was commenced, these courts only had jurisdiction for enforcing liens against real estate. It would seem to be very clear, that neither a justice of the peace, nor the Law Commissioner's Court, had any jurisdiction of a case of this kind. Ordinary process of law, or process known to the law, must be understood to mean process of law in such courts as have jurisdiction of the parties, and of the subject matter of the action.

It was further objected that the plaintiff Decker, as assignee of the certified tax bill from the administratrix of Paul Buol, deceased, could not maintain the action upon it. It appears that the work was done by him under the contract for the administratrix, and that after it was done, and after the certified bill had been delivered to her, she assigned it to him, and authorized him to receipt for the money in her name. The certified bill was made out to Ursula Buol, administratrix of Paul Buol, deceased; the certified bill recognizes her as the contractor who performed the work, and the mere fact that it describes her as administratrix is immaterial. Her assignment of the bill may be regarded as an assignment of the cause of action, and it vested in him the whole equitable interest in the demand.

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He thus became the real party in interest; and we think he may maintain an action in the name of the city to his own use under the special act.

For want of jurisdiction in the court, the judgment will be reversed and the suit dismissed. Judge Wagner concurs; Judge Lovelace absent.

CITY OF ST. LOUIS TO USE OF JAMES CREAMER, Respondent, *v.*
JAMES CLEMENS, JR., Appellant.

Appeal from St. Louis Law Commissioner's Court.

Farish, for respondent.

Gardner, for appellant.

HOLMES, Judge, delivered the opinion of the court.

This case must be reversed and dismissed in accordance with the decision in "*City to use of Decker v. Rudolph*," at the present term, on the ground that the Law Commissioner's Court had no jurisdiction of such cases.

Judge Wagner concurs. Judge Lovelace absent.

CITY OF ST. LOUIS TO USE OF McGRATH & CAHILL, Respondent, *v.* JAMES CLEMENS, JR., Appellant.

1. *Constitution—Special Tax.*—Cases of *Egyptian Levee Co. v. Hardin* (27 Mo. 495), and *City of St. Joseph v. Anthony* (30 Mo. 539), affirmed.
2. *Practice—Answer—Counter-claim.*—Where the answer sets up new matter by way of counter-claim, to which no demurrer or reply is filed, the defendant is entitled to have a judgment by default entered upon the counter-claim.
3. *Practice—Parties.*—In a suit by the City of St. Louis to the use of the contractor, to recover the amount of a special tax levied for the improvement of a street under act of 1855, p. 25, the city is the substantial plaintiff, and a defence which would be good against the city will be available against its assignee.

36	467
81a	485
36	467
37a	485
36b	467
115	509
36b	467
64a	210
36b	467
146	564

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4. *City of St. Louis—Special Tax—Lien.*—The right to charge the real estate fronting upon a street improved under the act March 6, 1855, (Adj. Sess. Acts 1855, p. 25, § 6) with a lien for the amount of work done, does not depend upon the completion of the contract for the whole of the work ordered, but only upon the completion of the work in front of the property to be charged.
5. *Practice—City of St. Louis—Special Tax—Judgment.*—The suit against a party to recover the amount of a special tax levied under the act of March 6, 1855, p. 25, § 6, is a suit *in personam*, and authorizes a general judgment for the amount of the tax and interest as well as a special judgment against the property.

Appeal from St. Louis Circuit Court.

Gardner and Hamilton, for appellant.

I. The judgment is irregular and erroneous on its face. If the defendant was personally liable to any extent, and that liability could be made available in a proceeding, the avowed object of which was to enforce a lien on realty, the realty itself declared to be charged should have been directed to be exhausted before resorting to the property of the defendant generally for the deficiency. The relief granted by the judgment in this case was not in accordance with the case made by the petition. The only relief sought or prayed for in the petition is, that the amount of the several bills be adjudged a lien on the property, and that a special execution be awarded to enforce the same. The judgment on the other hand, as the record shows, is a general judgment against the defendant, with execution against his property, with the peculiarity that it is not to be levied on this particular property, "unless no sufficient property of the defendant can be found to satisfy the same," thus, as it were, virtually exempting it from sale under the execution, although adjudged to be charged with the lien.

II. The defendant in his answer claims damages growing out of the same contract, or transaction, set forth by the plaintiff as the foundation of his action. This claim should have been replied or demurred to, and upon the plaintiff's failing to comply with the statute in this particular, the defendant was entitled to his judgment (2 R. C. p. 1233, §

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13 & 16) as against the city ; beyond doubt the defendant was entitled to damages for the injury he had sustained. (City of St. Joseph v. Anthony, 30 Mo. 540 ; 2 Hill. on Torts, 511, et seq. ; Cavanaugh v. City of Brooklyn, 38 Barb. Sup. Ct. 237.) Nor is a set-off necessarily confined to the party in interest. (Driggs v. Rockwell, 11 Wend. 504 & 510.)

III. If there should be any doubt in the mind of the court as to the propriety of the defendant's claim for damages in the form of a set-off, or counter-claim, still it was error in the court below to exclude the evidence offered by the defendant to prove his damages, as he had an undoubted right to prove them up in the way of recoupment, especially as the plaintiff had full notice of the matter of defence by the statements in defendant's answer. (Barb. Set-off, p. 26 ; Gobel v. Jacoby, 5 Serg. & Ra. 122 ; Ives et al. v. Van Epps, 22 Wend. 155 ; House v. Marshall, 18 Mo. 373 ; Sedg. Dam., 3d ed., 452.)

Mauro, for respondent.

I. The court below did not err in refusing defendant judgment by default on his pretended counter-claim. While some of the allegations contained in it might, if substantiated, afford grounds of defence, they do not amount to, or constitute a counter-claim under the statute. 1. They do not constitute a cause of action arising out of the contract or transaction set forth in the petition, or connected with the subject of the action. The subject of the action is the special tax bill sued on. The only contract referred to is between the city and McGrath & Cahill, and the defendant is not a party to it. 2. The allegations do not constitute a cause of action arising out of a contract. 3. The claim set up is for unliquidated damages in nowise arising out of a contract.

II. The court did not err in refusing to permit the defendant to prove that the common council ordered the work at the instance of persons not owning property in the vicinity of the improvement. McGrath & Cahill, the contractors,

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are not responsible for the actions of the council, and much less for the motives which prompted those actions.

III. After the admission made by the defendant, the court properly refused to permit defendant to prove the facts sought to be established by the witness Oakes. It is admitted that McGrath & Cahill faithfully complied with the terms of their contract with the City of St. Louis, and that the work was done according to the terms of their contract. That was their whole duty. With the necessity for the work, and the manner it affected the property of defendant, they are in nowise connected. The city is not liable, and surely McGrath & Cahill cannot be. (*City of St. Louis v. Gurno*, 12 Mo. 414; *Lambar v. City*, 15 Mo. 610.)

IV. The act is constitutional, because the principle invoked has been so well settled against the defendant, that it is not now subject to dispute. (*Lockwood v. City*, 24 Mo. 20; 4 Comst., N. Y., 420, & Appendix, 609; *Palmyra v. Morton*, 25 Mo. 598; *City of St. Joseph v. Anthony*, 30 Mo. 539.)

HOLMES, Judge, delivered the opinion of the court.

This was a suit upon certified special tax bills for the cost of grading, macadamizing, guttering and curbing O'Fallon street, between Twenty-fourth and Twenty-fifth streets, in the city of St. Louis, under the act of January 16, 1860. The petition was in the usual form, and the facts stated in it were proved. The answer denied all the material allegations of the petition, and set up as a special defence, or counterclaim, a demand for damages done to the property of the defendant, by reason of the negligent, unskilful, careless and improper manner in which the work in question was done. To this reference there was no reply nor demurrer. On the trial, the defendant asked for a judgment by default on this defence, and for an inquiry of the damages. The court refused to give such judgment by default, and the trial proceeded. Some evidence was offered by the defendant tending to support this defence. But at the same time it was

admitted that he did not propose to prove that the work had not been done, so far as it was done, according to the contract, nor that the stipulations of the contract, so far as the work had proceeded, had not been fully complied with on the part of the contractors; and this evidence was excluded. There was also evidence tending to show that the whole work contracted for had not been completed, the progress of the work having been stopped by the city authorities, though that part of the work which fronted on the defendant's property had been finished. Several instructions were refused for the defendant, and there was a general judgment against the defendant for the amount of the tax bills, with fifteen per cent. interest added; and further, that "if no sufficient property of the defendant can be found to satisfy the same, then the residue thereof to be levied out of the above described property charged with the lien thereof."

The appellant raises these points:

1. That the judgment is illegal, irregular and erroneous.
2. That there should have been a judgment by default on the special defence.
3. That the evidence excluded on this defence should have been admitted.
4. That the plaintiff could not recover unless the whole work contracted for had been completed; and,
5. That the act itself was unconstitutional.

All question of the constitutionality of acts of this nature must now be considered as settled by the repeated adjudications of this court in similar cases. (Egyptian Levee Co. v. Hardin, 27 Mo. 495; City of St. Joseph v. Anthony, 30 Mo. 537.)

The refusal of the court to give judgment by default on the special defence, or counter-claim, for want of a reply, demurrer, or any other answer, was clearly erroneous. The defence was such as would constitute a separate cause of action by itself. It was not a mere traverse of the matter stated in the petition, but a substantive and independent special defence containing new matter. It was a counter-claim by way of recoupment of damages against the plain-

tiff. It would have been a good defence to the action if proved. The city is, in such cases, the substantial plaintiff, though the suit is brought to the use of the contractor, who is to receive the money when recovered. As the assignee of the city he stands in her place, and any defence that may be good against the city, on that demand, will be good against him as well. This defence arose out "of the same transaction as that set forth in the petition, as the foundation of the plaintiff's claim," and was "immediately connected with the subject of the action" (R. C. 1855, p. 1233, § 13); and if this defence had been established, it would have been a complete rebuttal of the *prima facie* case of liability on the part of the defendant which the plaintiff had shown. It was held in the case of the City of St. Joseph v. Anthony, (80 Mo. 537,) that such negligence, or unskilfulness on the part of the civil authorities entrusted with work of this kind, if the defendant were injured thereby, might constitute a defence. (Lambar v. City, 15 Mo. 610.) At any rate, there should have been a reply, or a demurrer, or a judgment by default, on this part of the answer; and if the case had required it, there would have been a writ of inquiry of the damages. (R. C. 1855, p. 1233, § 16.) But here the plaintiff was in default, and he might therefore very properly have been compelled to proceed with the inquiry of damages, on the same trial, unless he could show cause for a continuance of the case. Evidence was admitted upon this defence, though no issue upon it had been made up.

In the exclusion of the testimony of the witness Oakes, we do not see that there was any error, when there was no proper issue on which it could be offered. The city had power to make such improvements, and to enter into contracts for such work; and if the contract were faithfully performed, and the work was done according to contract, it is not apparent how this evidence could have tended to support the defence. We do not say, however, that the city could not make contracts and direct work of this kind to be done, or that it could not have been done in an unskilful

and improper manner, or in such a way as to render the city liable for damages ; and if it clearly appeared that the evidence was offered for this purpose, and tended to prove the issue, we think it should have been admitted.

The sixth and seventh instructions asked by defendant were rightly enough refused. The right to charge the property with the lien, under this act, does not depend upon the completion of the whole work contracted for, but only upon the completion of the work which is charged against the property of the defendant. In this respect the act differs from the act concerning sewers.

It is objected that a general judgment was rendered against the defendant *in personam*, when it should have been *in rem*, only against the property. The act itself makes no special provision with regard to the form of the judgment. It provides only that the contractor may proceed to collect the bill by ordinary process of law. The tax is to be a lien on the property, and the bill is to be made out and certified in the name of the owner. He is to be required to pay the tax ; he is made liable for the amount of the bill ; and he must be a party to the suit. The court must have jurisdiction both of the party and the subject matter. A judgment is the conclusion of law upon the facts proved, or admitted by the parties, or upon their default in the course of the suit. (2 Tidd's Prac. 930.) Judgments rendered in any court of record are a lien on the real estate of the defendants situated in the county, (R. C. 1855, p. 902, § 2,) and the execution is to be in conformity with the judgment (R. C. 1855, p. 735, § 1), and it is to be a *fiери facias* against the goods and chattels and real estate of the parties against whom the judgment is rendered. (*Ibid.*) The facts which are to be proved or admitted, in these cases, are such as will warrant a judgment to be rendered against the parties defendant. That judgment must be general like any other ; as such, it is a lien against the real estate of the defendant from the time of its rendition, by virtue of the general law concerning judgments, and it will authorize an ex-

City of St. Louis to use Young v. Clemens.

ecution to be issued in the usual form ; but besides the lien of the judgment in general, there is in these cases a specific tax lien on the lot of ground in question which exists from the date of the assessment, and this lien is also to be enforced. The judgment must therefore be a general judgment *in personam*, and also a judgment *in rem* against the property charged with the tax lien ; and the execution should be in conformity with the judgment. Such was the judgment rendered in this case, and we think it was in conformity with law.

The defendant excepted to the exclusion of evidence offered to show that the owners of the property on this street had never petitioned for this improvement. The city has power to make these improvements in all cases "where the city council shall deem it necessary," as well as upon a petition of the majority of the owners. (Act of March 5, 1855, § 3.) It was therefore wholly immaterial whether there was a petition in this case, or not.

For any thing we can see, the action of the court below in the matter of the default, and the defendant's counterclaim or special defence, being erroneous, may have prejudiced the rights of the defendant. The judgment will therefore be reversed and the cause remanded, with leave to the plaintiff to reply, or demur, and for a new trial in conformity with this opinion.

Judge Wagner concurs ; Judge Lovelace absent.

CITY OF ST. LOUIS TO USE OF CHARLES YOUNG, Respondent, v.
JAMES CLEMENS, JR., Appellant.

Appeal from St. Louis Circuit Court.

C. G. Mauro, for respondent.

Gardner, for appellant.

 Ivory v. Bank of the State of Mo.

HOLMES, Judge, delivered the opinion of the court.

The points made in this case were ruled in favor of the plaintiff in the cases of the "City to the use of McGrath et al. v. Clemens," and "City to use of Lohrum v. Coons," decided at this term and for reasons then given. There was no special defence set up in the answer in this case, as in "City to use of McGrath et al. v. Clemens," in which that case was reversed.

The judgment is affirmed. Judge Wagner concurs; Judge Lovelace absent.

95	435
51a	61
36	475
124	37

JOHN C. IVORY, Respondent, v. THE BANK OF THE STATE OF MISSOURI, Appellant.

1. *Bill of Exchange—Grace.*—A check drawn upon a bank, requesting it to pay money, at a day subsequent to its date, to a third party, or order, is entitled to grace; and a presentment on the day named is not a good presentment so as to bind an endorser upon demand and refusal of payment and notice.
2. *Bank—Negligence—Action.*—A bank receiving for collection a check payable at a subsequent date, and presenting the same for payment upon the day named without allowing days of grace, is liable to an action by the owner of the check for its negligence in making demand.

Appeal from St. Louis Court of Common Pleas.

This was an action for negligence, alleged against the appellant, for failing to make presentment, demand, protest and notice of the dishonor of the following instrument of writing:

"St. Louis, 12 Oct., 1860.

"The Southern Bank of Saint Louis:

"Pay to M. C. Jackson & Co., or order, five hundred dollars, on 22d of October.

"\$500.00. Bf.

E. WEBBE & Co."

Endorsed, "M. C. Jackson & Co."

It appeared in evidence on the trial, that on the 12th of October, 1860, and for more than a year before and after that day, the respondent was one of the directors of the bank;

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that on said day the agent of respondent offered to the note clerk of appellant, for collection, the instrument of writing above set out. The note clerk objected to receiving this paper, saying to the agent of respondent that the appellant was not in the habit of receiving such paper for collection. Respondent's agent insisted that this paper should be received, saying it was only required it should be presented for payment at the Southern Bank on the day of its maturity, which was agreed upon then to be the 22d day of October, and was so written down in respondent's bank book, this book remaining in his possession.

The paper was delivered to a notary on the 22d of October, 1860, for presentment and demand. Said notary made presentment and demand on said 22d day of October, when the paper was dishonored, and immediate notice thereof was the same day given to all the endorsers, including the respondent, who gave no further instruction in the matter.

In October, 1860, the drawers, E. Webre & Co., were insolvent. The endorser, M. C. Jackson, was then and ever since solvent.

The Court refused the following instructions, asked for by the appellant:

1. If the jury believe from the evidence that it was contrary to the rules and usages of defendant for its employees to receive for collection such paper as is set out in the petition of plaintiff, and that the employee of the defendant received said paper without any authority from the president, cashier, or board of directors, of defendant, then they will find for defendant.

3. The check was not entitled to days of grace, but was properly due and payable on the 22d of October.

4. If the plaintiff knew at the time said check was deposited with defendant that it was not such paper as it was usual for defendant to receive for collection without a special order therefor from the president, or cashier, or board of directors, then it was the duty of plaintiff to procure such special

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order; and if he caused said check to be deposited without any such order, then the plaintiff cannot recover.

5. If the plaintiff, within one day after the 22d day of October, on which said check was protested, was informed of the protest of said check on that day, and then consented that it should not be protested after the days of grace had expired, then plaintiff cannot recover.

The court gave the following instructions, asked for by the appellant:

2. If the jury believe that the agent of plaintiff, at the time he deposited said check with defendant, left instructions that the same should be protested on the day of its maturity, without grace, and that said check was so protested, then the plaintiff cannot recover.

6. If it does not appear from the evidence that the plaintiff had used proper means to collect the check, in said petition described, since its return to plaintiff, then the plaintiff cannot recover; [given by the court, with the addition] unless it appear that the drawers of the draft were insolvent at its maturity, and have continued insolvent, so that any proceedings against them would have been unavailing.

At the conclusion of the trial, the court, sitting as a jury, rendered judgment in favor of plaintiff.

C. F. Burnes, for appellant.

I. The instrument described in the petition as the foundation of this suit is a check, payable on the day named therein, without days of grace. (*In re*, Brown, 2 Stor. C. C. 503, 511, 518; Chit. on B. 411, note 1; Sto. Prom. N. § 490; 21 Wend. 373; 2 Hill. 430; Bowen v. Newell, 5 Sandf. 327.)

II. Persons dealing with a bank, and knowing its rules and usages, are bound by them, and a jury would be authorized to find an implied agreement or assent thereto. (10 Cush. 580.)

III. Persons dealing with an agent, and knowing that the

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agent is exceeding his authority, cannot hold the principal accountable for such acts of the agent thus known to be without authority.

IV. The subsequent act of respondent ratified the acts of the notary and clerk, and made them his agents instead of the agents of the appellant.

G. P. Strong, Glover & Shepley, for Respondent.

LOVELACE, Judge, delivered the opinion of the court.

The first question in this case is, whether the instrument, which forms the basis of the action, is a bill of exchange, and as such entitled to days of grace. Kent has defined a bill of exchange to be "a written order or request, by one person to another, for the payment of money, absolutely and at all events." (Kent's Com. § 44, p. 74.) Story says of this definition that "its peculiar distinguishable quality in modern times, its negotiability, is omitted"; and he, accordingly, adopts the definition of Mr. Kyd, which states it to be "an open letter of request addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid, or it may be payable to bearer." (Sto. on B. Ex.)

The instrument in question is addressed to the Southern Bank of Saint Louis, and requests it to pay to M. C. Jackson & Co., or order, five hundred dollars, on the 22d of October, and signed by E. Webre & Co. It seems, then, exactly to fall within the above definition of a bill of exchange.

At common law, all bills of exchange and drafts for money, except those payable on demand, (or where no time for payment was specified, and they were construed to be payable on demand,) were entitled to three days of grace. Our statute makes these payable at sight, or on demand—payable when presented, without days of grace; and, with this qualification, all bills are entitled to grace. This bill is neither payable at sight nor on demand, but on a day certain; and

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it was therefore entitled to grace, and it was negligence to present it before grace had expired.

As to whether the bank was accustomed to dealing in this kind of paper, is a matter of no importance. It was a species of paper that banks are generally in the habit of dealing in, and the officers of the bank did, in point of fact, undertake to collect this particular bill, and it was clearly its duty to use proper diligence and present it for payment on the proper day, after days of grace.

There was no error in refusing instructions numbered 1, 3, 4 and 5, asked by defendant. Instructions numbered 2 and 6 properly set out the law of the case. As to whether the plaintiff might have had the check presented in time after he received notice of the protest, is sufficiently set out in instructions numbered 6. He plainly would not have it presented before it was returned to his possession, and all he could do was to use due diligence after he received it.

The judgment is affirmed. The other judges concur.

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SOLOMON PARMLEE, Respondent, v. W. S. CATHERWOOD *et al.*,
Appellants.

Contract—Sale.—Possession of personal property is presumptive evidence of title; but where a sale is made and possession delivered to the purchaser, yet if by express agreement the title is to remain in the seller until the price be paid, the right of property is not vested in the purchaser until payment. And where the vendor has been guilty of no laches, he may reclaim the goods from a third party who took them in good faith and without notice.

Appeal from St. Louis Law Commissioner's Court.

Coleman, for respondent.

Jones & Sherman, for appellants.

WAGNER, Judge, delivered the opinion of the court.

This was a suit originally brought before a justice of the peace, under the statute for the claim and delivery of per-

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38a	65
36	479
115	255
116	572
26	479
59a	556
36	479
63a	103
36	479
491a	589

sonal property; the plaintiff had judgment in the justice's court, and the defendant appealed to the Law Commissioner's Court. On the trial of the cause before the Law Commissioner (both parties having waived a jury), it appeared from the evidence that the plaintiff sold to one Beebee a mirror—which is the article here in controversy—for forty dollars, to be paid for on delivery; that when it was sent to Beebee's he had not the money to pay for it, and it was agreed between plaintiff and Beebee that it should remain in the house of the latter, but should continue to belong to plaintiff till paid for. Beebee shortly afterwards sold a lot of personal property, including the mirror, to the defendants, partly for cash, and partly to satisfy a debt he owed them. There was no evidence to show that defendants had any notice of the conditional character of the sale, or of the agreement about the ownership of the mirror between plaintiff and Beebee. The Law Commissioner gave judgment for plaintiff, and the defendant appealed to this court.

From the testimony it is abundantly shown that the sale was conditional, and was not to be complete or absolute till the condition was complied with; that is, until the property was paid for. It is true, the possession of personal property is *prima facie* evidence of ownership; but where a sale is made and the property is delivered to the purchaser, yet by express agreement of the parties the title is to remain in the seller until the payment of the price, such payment is strictly a condition precedent, and until performance the right of property is not vested in the purchaser. And where the seller has been guilty of no laches, he may reclaim the goods so sold and delivered from a third person who took them in good faith from his purchaser and without notice. (1 Pars. on Contr. 537, 5th ed.; Sto. on Sales, § 818, Perkins' ed., and authorities there cited.)

We are aware that it has been held in the New York courts that a vendor in such conditional sale could not claim the goods as against the *bona fide* purchaser of the vendee; but the better doctrine seems to be, that where property is

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sold on condition to one who is allowed to assume possession and the apparent ownership, third persons have a right to consider it his, and the burden of proof is on the vendor to show the condition and that it has not been complied with. (Leighton v. Stevens, 19 Me. 154 ; Hill v. Freeman, 3 Cush. 257 ; Heath v. Randall, 4 *ibid.* 195.) Here the proof furnished by the vendor was clear and certain as to the condition of the sale, and as to the non-compliance on the part of the vendee with the condition.

The judgment was for the right party and is affirmed. Judge Holmes concurs ; Judge Lovelace absent.

CHARLES CONNOYER *et al.*, Plaintiffs in Error, v. WASHINGTON UNIVERSITY, Defendant in Error.

Lands—Confirmations—Enurement.—A confirmation by the board of commissioners, under act of Congress of July 4, 1836, to D., or his legal representatives, enures to the benefit of those who show themselves to derive title through D., and not to the persons presenting the claim. (Hogan v. Page, 22 Mo. 55, and 32 Mo. 68, affirmed.)

Error to St. Louis Land Court.

Whittelsey, for plaintiffs in error.

The decision of the board is as follows : "The board are of opinion that the claim ought to be confirmed to the said widow Dodier, or her legal representatives, according to the survey in Livre Terrein No. 2, p. 38." (See book No. 7, p. 185.)

I. The confirmation was made by the board and act of Congress to widow Dodier, or to those who proved themselves to be in law her legal representatives, and not to Louis Labeaume, who presented the claim to the old board in 1811, any further than he showed himself to be the assignee by legal conveyances. It was admitted that plaintiffs were the owners of one-fourth of the land, as heirs and representatives of widow Dodier, and that Labeaume did not have the whole title.

The appellants rely upon the decision of this court, in the case of *Hogan v. Page*, 22 Mo. 55; 32 Mo. 68. The Supreme Court of the United States have affirmed the principle decided in *Hogan v. Page*, (S. C.,) 2 Wal. 605.

The board of 1832, by their action, refused to decide the question as to who were the legal representatives of Dodier, and left that matter to be determined by the courts.

Glover & Shepley, and *T. T. Gantt*, for defendant in error.

The plaintiffs showed no case entitling them to recover. This is the precise case decided by the Supreme Court of the United States, in the case of *Bissell v. Penrose*, 8 How. 317, which has not only never been overruled, but has been repeatedly affirmed, both by our Supreme Court and the Supreme Court of the United States, even down to the latest decision upon these questions, in the case of *Hogan v. Page*, 2 Wal. 605. A consideration of the reasons assigned for the reversal of the case of *Hogan v. Page*, will show how entirely the principle of the case of *Bissell v. Penrose* was affirmed.

HOLMES, Judge, delivered the opinion of the court.

It appears from the evidence that Louis Labeaume, assignee of the widow Dodier, filed his claim before the old board of commissioners in 1811, claiming three by forty arpens of land in the prairie adjoining the town of St. Louis, together with the concession of May 28, 1772, to the widow Dodier, and a deed of transfer of title from said Dodier and others to Louis Labeaume, (the claimant,) dated August 18, 1806; and that his claim was rejected. It also appears that in 1833, "widow Dodier, by Louis Labeaume's representatives, claimed the same tract of land, before the new board of commissioners, and produced the concession and Duralde's survey from the *Livre Terrein*, (No. 2, p. 38,) and also a deed from the "lawful heirs" of said widow Dodier to Labeaume, which appears to have been executed by the widow Dodier herself, and others, dated August 18, 1806. The

bill of exceptions also contained a deed to Louis Labeaume, (how it got there does not appear,) from Joseph Hortiz, of the land granted to said widow Dodier, and purchased by him at a public sale and adjudication of the goods and property of the widow Dodier, under an order of the Lieut.-Governor, dated August 23, 1806 ; but it does not appear to have been filed with the board.

The board of commissioners, on the 15th of June, 1835—beginning their entry in these words: "Widow Dodier claiming 120 arpens of land"—confirmed the claim thus: "The board are of opinion that the claim ought to be confirmed to the said widow Dodier, or to her legal representatives, according to the survey in Livre Terrain No. 2, p. 38. The plaintiff put in evidence the survey of this confirmation, (No. 3306,) and proved that as heirs and assignees of the heirs of widow Dodier, they were representatives of one-fourth of the title of the said widow Dodier. On this evidence, the court instructed the jury, that the plaintiffs could not recover.

The question presented is whether the confirmation enured to the representatives of Louis Labeaume, as the claimants before the board, or to the widow Dodier and her legal representatives. Had the board confirmed the claim as presented before them by Louis Labeaume, there could be little doubt, under the decision in *Bissell v. Penrose*, (8 How., U. S., 317,) that the confirmation would have enured directly to him as the claimant who had presented the claim, and filed the evidence of his derivative title as assignee of the original grantee. But the claim before the board of commissioners of 1833 is in the name of "widow Dodier, by Louis Labeaume's representatives," and the board recognizing the "widow Dodier claiming 120 arpens of land," confirmed the same in terms to "said widow Dodier, or to her legal representatives." The claim is made in her name, by the representatives of Louis Labeaume. Who they were it nowhere appears. No claim is made by them in their own names, nor in their own right, otherwise than as "represent-

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atives" of Louis Labeaume, who might be her representative. No evidences are filed or produced by them to show a derivative title from any one to them, nor does it appear that any proof was made before the board that they were heirs-at-law of Louis Labeaume, taking by descent.

The cases of *Bissell v. Penrose*, (8 How., U. S., 317,) and *Boon v. Moore*, (14 Mo. 420,) would require that they should have made the claim for themselves; if not in their own names, at least in their own persons, and produced the evidence of their title as such legal representatives of the widow Dodier. This does not appear to have been done here.

As the case is presented on this record, we are of opinion that it falls within the principle of the decisions in *Hogan v. Page*, (22 Mo. 55; 32 Mo. 68; 2 Wal. 605.) For these reasons we think the instruction of the court below was erroneous.

Judgment reversed and cause remanded. Judge Wagner concurs; Judge Lovelace absent.



THOMAS BOLAND AND WIFE, Plaintiffs in Error, v. MISSOURI
RAILROAD COMPANY, Defendant in Error.

1. *Damages—Action—Negligence.*—The same rigid rule in determining what will be a bar to an action on the ground of contributory negligence will not be applied to an infant, an idiot, or an insane person, as to one who had arrived at an age to possess ordinary judgment and discretion. All that is necessary to give a right of action to the plaintiff for an injury inflicted by the negligence of the defendant, is, that he should have exercised care and prudence equal to his capacity.
2. *Practice—Trial—Instructions.*—Where the plaintiff has closed his evidence, and it has no tendency whatever to prove the issue necessary to a recovery, the court may determine the whole case as a matter of law.
3. *Damages—Action—Negligence.*—Where the defendant has used proper care and caution to prevent an accident, and has been guilty of no negligence, he will not be responsible for an injury caused by such accident.

Error to St. Louis Circuit Court.

Hill, for plaintiffs in error.

I. The question of negligence should have been left to

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the jury in such a case as this. So it has been held in the case of *Hulsenkamp v. Citizen's Railway Co.* (34 Mo. 45, and cases there cited; 1 Hill. on Torts, p. 135, § 45, & notes.) Proof of injury to a passenger on a railroad car, is held *prima facie* evidence of negligence. (*Zemp v. Wilmington*, 9 Rich. Law, 84.)

II. It is objected by the defendant that the plaintiffs were guilty of negligence in permitting their child to go out of the house in the open air and sunshine without a nurse, or attendant. (1 Hill. on Torts, 162, § 17, et seq.) The common sympathies of mankind are endorsed in these words: "The plaintiff is only bound to exercise care and prudence equal to his capacity." "Thus, although a child of ten years may be in the highway through the fault and negligence of his parents, yet if injured through the negligence of the defendant, he is not precluded from his redress." (*Robinson v. Cone*, 22 Vt. 213; *Buge v. Gardiner*, 19 Conn. 507; *Oldfield v. New York, &c.*, 3 E. D. Smith, 103; *Lynch v. Nardin*, 41 Eng. Com. L. 422; *Adams et als. v. Wiggins' Ferry Co.* 27 Mo. 95.)

The only case relied on by defendant, is *Hartfield v. Rooper*, 21 Wend. 617, which is commented on; 1 Hill. on Torts, 166; *Payne v. Smith*, 4 Dana, 497.) The general principle that one party cannot recover damages from another when both are in fault, or in *pari delicto*, has these exceptions:

1. Although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequence of the defendant's negligence, he is entitled to recover.

2. All the consequences that may flow from wrongful or negligent acts must be borne by the party guilty of them, and he is not relieved from responsibility that the consequences of the injurious act could have been prevented by the skill or care of the injured person.

3. The injured person, although in fault to some extent,

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may be entitled to damages for an injury which could not have been avoided by ordinary care on his part.

4. Where the negligence of the defendant is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act or omission, not occurring at the time of the injury.

5. Where a party has in his custody, or control, dangerous implements or means of injury, and negligently uses them or places them in a situation unsafe to others, and another person—although at the time even in the commission of a trespass, or otherwise somewhat in the wrong—sustains an injury. (*Cook v. Champlain*, 1 Denio, 91.)

These two maxims fix the responsibility of the defendant for this injury.

Glover & Shepley, for defendant in error.

I. The plaintiff must show that injury was not occasioned by his own negligence. (*Boland and wife v. Missouri R.R.* 33 Mo. 311; 19 Wend. 400; 5 Carr. & P., 375; 6 *id.* 23; 8 *id.* 28; 21 Wend. 615; 2 Hall, 131; 5 C. & P. 375; 8 *id.* 373; 6 Hill. 592; 9 C. & P. 601; 1 Crompt. & Mee. 21; 8 Mee. & W. 244; 10 *id.* 546; 12 Pick. 177; 23 Conn. 441-4.)

The plaintiff must show the injury was not caused wholly or in part by his negligence. (21 Barb. 339; 5 *id.* 337; 13 *id.* 9-16; 14 *id.* 584; 6 Cow. 191; 23 Penn. S. R. 147; 1 Dutcher, 556-7; 12 Metc. 415; 1 E. D. Smith, 74; 12 Peck. 177; 11 East. 61; 6 Whea. 325.)

II. There was no negligence shown on the part of the defendant; none on the part of its agents. The car was moving slowly; the driver's attention was directed to the other side of the street, looking out for a threatened collision on that side, and holding his hand on the brake; most certainly the driver did not see the child, and had no right to suppose a child of two years old would be there. As soon as the alarm was given the driver stopped. There was no proof of ordinary care on the part of plaintiffs.

If there was want of ordinary care on the part of plaintiffs they could not recover. The burden of proof was on them to show ordinary care. They did not show the least care. There were, then, two reasons for forbidding recovery : 1. The absence of any proof of defendant's negligence. 2. The absence of any proof of ordinary care by plaintiffs.

WAGNER, Judge, delivered the opinion of the court.

This was a suit under the statute, commenced by the plaintiffs against defendant, to recover damages for the killing of their daughter, a child aged about two years. From the record, we gather these facts: The little child, unattended, was walking across Market street, over the paved crossing, on the west side of Fifth street, one of the most public thoroughfares in the city of St. Louis, and at the same time defendant's horse car was going west over Fifth street on Market street. The child was proceeding in a fast walk and the by-standers, seeing her danger, cried aloud to the driver to stop the car; but the driver's attention being turned in another direction, he did not stop till the child was run over and killed.

C. B. Wardrop testified for the plaintiffs: "I was crossing Fifth street going west, out Market street; the horse-car was going out also; I was north of the horse-car track. I saw the little child start from the curb to go from the north-west to the south-west corner of Market and Fifth streets, on the paving across the street, and I ran toward the car as fast as I could *hallooming* to the driver to stop, and another man just ahead of me was hallooming, and ran towards the car; the driver's attention seemed to be called to the opposite side of the street. The car continued going on, and the child's head struck the front point of the steps and the wheel passed over its body. The child was three or four feet from the car when I halloood; the car was going at a very slow walk; the horses did not touch the child. I think the step of the car above struck the child; I think the corner of the step touched the child; it fell forwards straight across the track;

the child at the time I halloood was five or six feet from the driver, the driver standing at the brake at the right of the platform where the child was struck. There was a wagon standing near the corner on the south side of street, and the driver had the brake in his hand, and seemed to fear a collision with the wagon. I can't say which went faster, the child or the car; the child went between a run and a walk, as fast as children usually toddle. I ran as far as the east end of the car, where the child was run over. If the driver had been looking towards the child at the time, I think he could have stopped the car; the other man was near me and halloood about the same time I did. I heard the child make a noise when the car struck it; it threw its arms back when it was picked up; I can't say whether the child lived or died, for I went away after the child was picked up."

Defendant admitted that the child was killed.

On cross examination, the witness stated: "The wagon on the south side of Market street was standing still; I think the eyes of the driver were upon the wagon; there had been rubbish there all the spring, between the wagon and the track. It seemed to me, then, that there was danger of a collision between the wagon and the car; it stopped directly upon the child; I think the driver stopped as soon as he could; the driver had his hand on the brake all the time; the driver was going slow to prevent a collision. I don't think the driver saw the child until the car struck it; I cried out, 'Hold on, stop!' The driver stopped as soon as he could after he heard the cry 'hold on;' the speed of the car determines the distance in which it can be stopped; don't think it possible to tell how soon a car can be stopped. I saw no one attending the child; it was a little infant child just about able to walk. I don't think the child ran on the crossing; my impression is that the child did not run as fast as it could go; it toddled across the street about as fast as a little child usually goes. I can't tell how long it was going across; it might be a minute or a minute and a half before the car struck the child; I went as fast as I could, and the

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child was thrown down before I got to it. When I first saw the child, it was stepping from the curb-stone on the crossing; I don't think any relations appeared to claim the child; the man who took the child in his arms was a stranger to me. I don't know that it occurred to me at the time, that the driver did not stop as soon as he could; I think the driver stopped as soon as he could; I looked directly at the driver, to see if he would stop for the child; he was looking at the wagon on the south side of Market street. He had his hand on the brake with his knee against the dash-board; I saw nobody that had charge of the child. I think the wagon was standing, but it might have been moving; if it was moving, it was a very slow motion. I can't say now, but I suppose I thought it moving when I gave my deposition. The corner of Fifth and Market streets is one of the most frequented thoroughfares in the city of St. Louis."

This was substantially all the evidence in regard to the killing. There was some other evidence given by the plaintiffs in the cause, but it need not be noticed, as it does not alter or vary the above. When the plaintiffs rested, the defendants asked and the court gave the following instruction: "That on the evidence in this cause, the plaintiffs cannot recover."

Plaintiffs thereupon took a non-suit, and after an unavailing motion to set the same aside, bring the case here by writ of error.

It is argued by the counsel for the defendant, that permitting a child so young, and so obviously wanting in discretion, to go alone and unattended on a principal thoroughfare in a busy city, is such negligence as will preclude a recovery. Nothing can be plainer than that the plaintiffs cannot claim that they were without fault. The allowing of an infant of such tender years to go on the streets or open highways, amidst the many dangers to which she was exposed, without any one in attendance to afford her adequate protection, betrayed culpable carelessness and inattention. But we are not to apply the same rigid rule in determining what will be

a bar to the maintenance of an action on the grounds of contributory negligence to an infant, an idiot, or a person *non compos mentis*, that we would to one who had arrived at the age to possess ordinary judgment and discretion.

All that is necessary to give a right of action to the plaintiff for an injury inflicted by the negligence of the defendant, is, that he should have exercised care and prudence equal to his capacity. It would be palpably unjust to require of a child of small capacity and little discretion the same precaution and prudence which might reasonably be expected of a person of elder years. If, therefore, any one using dangerous instruments, running machinery, or employing vehicles which are peculiarly hazardous, and he know that infants, idiots, or others who are bereft of, or have but imperfect discretion, are in close or immediate proximity, he will be compelled to the exercise of a degree of caution, skill and diligence, which would not be required in case of other persons.

It is true, Judge Cowen, in *Hartfield v. Roper* (21 Wend. 615), makes no distinction between the responsibility of infants and those who have grown up to years of discretion; and he there held, that although a child, by reason of his tender age, be incapable of using that ordinary care which is required of a discreet and prudent person, yet the want of such care on the part of the parent or guardians of the child furnish the same answer to an action by the child, as would its omission on the part of the plaintiff in an action by an adult. Whilst the decision in *Hartfield v. Roper* may be supported by the facts in the case, as failing to show such negligence as would fix liability on the defendants, the reasoning of the learned judge on infantile responsibility is certainly harsh and repugnant to justice.

We think the doctrine enunciated by Judge Redfield much more sound and in entire consonance with justice and reason:—"And we are satisfied that although a child, or idiot, or lunatic, may to some extent have escaped into the highway through the fault or negligence of his keeper, and

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so be improperly there ; yet, if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one knows that such a person is in the highway, or on the railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be *gross* neglect as to a child, or one known to be incapable of escaping danger." (Robinson v. Cone, 22 Vt. 218 ; Boss v. Littleton, 5 Car. & Payne, 407 ; Lynch v. Murdin, 1 Ad. & Ellis, N. S. 28.)

What is reasonable skill, proper care, caution, prudence or diligence, or what constitutes negligence, is strictly matter of fact, and can only be determined by a jury. The subject is so indefinite and variable in its very nature, that it is impossible to lay down or establish any precise rules. Every case must necessarily be governed by its own facts and circumstances.

But it is insisted in behalf of the plaintiffs in error, that the court below erred in giving the instruction that upon the evidence the plaintiffs could not recover. It is well established that when the testimony is all in one direction, or when all the evidence for the plaintiff has been given, and it has no tendency whatever to prove the particular issue relied on to recover, and there is no question in regard to the credibility of the witnesses who have given the evidence, the court may determine the whole case as a question of law. (Vinton v. Schwab, 32 Vt. 612.) The credibility of witnesses, and the weight of evidence, are for the jury ; but whether there is any evidence, or what its legal effect may be, is to be delivered by the court.

The instruction in this case is in the nature of a demurrer to evidence. It does not intermeddle with the facts, but admits their truth, and then pronounces the judgment of law that they are insufficient to support the action. (Harris v. Woods, 9 Mo. 112 ; Lee v. Davis, 11 Mo. 114 ; U. S. Bank v. Smith, 11 Wheat. 171.) By a demurrer to evidence the defendant takes the questions of fact from the jury

where they properly belong, and substitutes the court in the place of the jury; and every thing which could reasonably be inferred by the jury in favor of the plaintiff, arising out of his testimony, is to be taken as admitted by the defendant's demurrer. If he will take the cause from the usual and proper triers of the facts, and substitute another and different tribunal in their stead, every inference is to be made most strongly against him.

Now, by reference to the evidence, we think it clear there was no negligence shown by defendants or their agents. The attention of the driver of the car was directed to another point of the street, where he anticipated danger. He was driving slowly and cautiously, with his knee against the dashboard of the car, and his hand on the brake, to be ready in an instant to stop the car, and prevent damage in case the threatened collision took place. There is nothing whatever to show that he knew the child was approaching the car, or had any reason to apprehend the child was there. The witness states that the child was from three to five feet from the car when first discovered, and the alarm given, going directly ahead, and at rather a rapid rate. The driver stopped as soon as he could, but not till after the fatal accident had happened.

We see nothing in the facts, as detailed by the testimony, that can stamp him with negligence. The occurrence was one of those lamentable and painful misadventures which frequently happen, and are always to be regretted, but fails to evince any such criminal or blameworthy negligence as would make the defendant liable in damages.

The judgment is affirmed. Judge Holmes concurs; Judge Lovelace absent.

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GEORGE HARVEY AND EDWIN H. WHEDON, Respondents, v.
WILLIAM McK. BROOKE, Appellant.

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1. *Practice—Trial.*—The re-opening of a case, to allow a plaintiff to offer further evidence, after he has declared his evidence closed, is a matter within the discretion of the court, and will not be reviewed except where the discretion has been unfairly exercised.
2. *Practice—Note.*—The holder of a note who has purchased the same for value may, under our statute, maintain an action in his own name without an endorsement.

Appeal from St. Louis Law Commissioner's Court.

Van Waggoner, for appellant.

LOVELACE, Judge, delivered the opinion of the court.

This is an action to recover the amount of a negotiable promissory note, executed by the defendant to Thomas L. Price, Alexander Lee, Thomas William, Joseph Brooks, and James B. Gardenhire, trustees of the University of Missouri, at Jefferson City. The note is endorsed by Thomas William and Harvey & Whedon.

The execution of the note was not denied, and the plaintiff, at the trial below, introduced the note and announced that he would close his evidence.

The defendant then asked some instructions as to the law, when the plaintiff asked leave to re-open the case, which was granted; and he then introduced evidence to prove that he purchased the note from the legal owner for value. A judgment was rendered for the plaintiff for the amount of the note, and the defendant brings the case here by appeal.

The appellant insists that the plaintiff had no right to re-open his case after he had announced his evidence closed, and also contends that the assignment was insufficient to pass title to the plaintiff, so as to enable him to maintain an action in his own name.

As to the re-opening the case, that was a matter almost entirely within the discretion of the court below; and to be a cause of reversal, it ought to appear that the court was

guilty of some unfairness, such as re-opening for one party, and refusing to admit the other to introduce evidence to counteract that introduced by the party for whose benefit the case was re-opened; or that the adverse party was in some way prejudiced by the re-opening of the case.

The *ni si prius* courts ought to exercise a sound discretion in such matters, but this court would only reverse in such cases where real injury had been done, and we fail to see that the defendant has suffered any injury in this case by reason of its having been re-opened. He offered no counter-evidence, nor did he state that he had any to offer.

With regard to the endorsement on the note, it was sufficient, in connection with the evidence, that the plaintiff had purchased it for value. In *Bocka v. Nuella*, 28 Mo. 180, this court held that the holder of a negotiable promissory note, who had purchased the same for value, might, under our statutes, maintain an action in his own name without an endorsement.

Judgment affirmed. The other judges concur.

W. A. ROBBINS *et als.*, Plaintiffs in Error, *v.* HENRY ECKLER *et als.*, Defendants in Error.

1. *Confirmation—Commons—Survey—Title.*—The act of Congress of June 13, 1812, confirming to the inhabitants of the village of St. Charles their commons, together with an approved official survey by authority of the United States, are equivalent to a patent of the tract of land surveyed as commons; but no such effect can be given to the survey of the commons made by Antoine Soulard, March 2, 1804. The act of Congress did not purport nor intend to confirm claims to commons which existed on March 2, 1804, but only such as existed in fact prior to Dec. 20, 1803. In the absence of any official survey by the United States, the only way in which a title to commons under the act of June 13, 1812, can be shown, is by proof of some grant, concession, survey or actual possession, claim or user of some definite tract of land as commons prior to the 20th Dec., 1803. Without such evidence, there can be no title to commons under that act where no official survey is shown.
2. *Confirmation—Out-boundary Survey—Evidence.*—The out-boundary survey

of a town, including the town with its common-field lots, out-lots, and commons, is no evidence of the location, extent and boundary of the commons, nor of any private lot marked on the plat.

3. *Ejectment—Confirmation—Title.*—A plaintiff in ejectment who shows no title in himself cannot be permitted to controvert the *prima facie* title of the defendant under a confirmation and official survey by the United States.

Error to the St. Charles Circuit Court.

This was an ejectment to recover possession of so much of lots 14 and 20 of block 4 of Evans' survey of St. Charles commons as conflicted with United States survey No. 164 of an out-lot or common-field lot, in the *cul de sac* common fields, confirmed to Auguste Chouteau under J. B. Lacroix.

The plaintiffs claimed title under the Town of St. Charles, by virtue of a lease executed Mar. 5, 1856, of a part of the commons of said town in renewal of leases surrendered.

The defendants denied that the lease under which plaintiffs claimed covered the land in controversy, and also claimed title under the confirmation and survey to Chouteau.

The plaintiffs presented in evidence the claim of the Town of St. Charles to commons presented to the old board of commissioners and Soulard's survey of said commons certified March, 1804. On this survey of Soulard's, the *cul de sac* fields which are in the commons have a different direction from that given them in the United States survey of said fields and commons.

In 1817, Evans made a survey of the lands at St. Charles and sectionized them, connecting his surveys with the *cul de sac* fields, giving them the same location afterwards given them by Brown when he surveyed the commons and common fields. The out-boundary survey of the village with its commons and common-fields was in evidence. The survey of the commons made in 1844 was called for by the instructions, but did not appear in the record. This survey (the official government survey) differs from that of Soulard and includes more land.

To prove the acquiescence of the town in Brown's official survey, the defendants offered in evidence the official pro-

ceedings of the Town of St. Charles, from 1844 to 1855, in relation to said survey of commons, showing that they directed Brown to be supplied with information for making his survey; that they applied for plats of said survey; that they directed the plat to be filed as the official plat of said commons; that they directed portions of said commons to be subdivided, and lots to be sold, in accordance with said plat; that they subdivided and sold parts of the lands included in said survey and not included in Soulard's survey.

The plaintiffs, in making out their case, offered in evidence the claim of Chouteau under J. B. Lacroix as presented to the old board, and the claims as presented and proved before Recorder Hunt. The old board rejected the claim, but Hunt confirmed the same, under the act of 1812, as an out-lot in the *cul de sac* common fields.

An official survey of the claim was made in 1844, at the same time the commons were surveyed by Brown; and the Recorder of land titles issued a confirmation certificate with a copy of the official survey No. 164, made according to possession and the claim.

Part only of the lines of the Lacroix claim had been run by the survey made July 10, 1796, which survey says the tract contains 324 arpens; Chouteau's claim before Hunt called for 300 arpens, more or less. The defendants proved actual possession of the lot prior to Dec. 20, 1803.

Evans' survey of block 4 had been lost. In 1833, T. W. Cunningham, by direction of the town, undertook to retrace Evans' lines, some of which he found, and some he did not find; he made a plat which he thought conformed to Evans' plat. By his survey, lots 14 and 20 of block 4 conflict with U. S. survey No. 164, of the lot confirmed to Chouteau, and the *cul de sac* common fields.

The defendants offered testimony to show that Cunningham's survey of block 4 did not correspond with Evans', commencing at different points, and showing also that in 1838 he made a survey and subdivision of survey 164, which showed no interference of the subdivisions of block 4. De-

fendants denied that Evans' survey of block 4 interfered with the *cul de sac* common fields and survey 164. Survey No. 164 was of a common-field lot, of 9 arpens front and rear by 36 deep; the plaintiffs contended that it was only one arpent in the front by nine in the rear, and 36 arpens deep.

The plaintiffs asked nineteen instructions, all of which, except that relating to the rents and profits, were refused.

The defendants asked five instructions, which were given, and thereupon the plaintiffs took a non-suit with leave, &c.; and their motion to set aside non-suit being overruled, they took up the case by appeal.

T. W. Cunningham and *E. A. Lewis*, for appellants.

The court was in error both in its assumptions of fact and in its conclusions of law.

I.—1. No chain of title is shown for defendants from the Lacroix claim. The proof originates their title and possession with Thomas J. Payne in 1839. As the twenty-year limitation law was in force at the commencement of this suit in 1858, the defendants thus show no available title in themselves from any source: nor do they make the Lacroix claim available as an outstanding title; for an outstanding title, to be available as a defence, must be such as would support an action of ejectment. But the last actual possession under the Lacroix claim shown anywhere in the evidence is that of Lacroix himself, in 1804. Such a claim of title is expressly barred by the statute. (R. C. 1845, p. 715, § 1.)

2. The survey of the out-boundary of the commons had nothing whatever to do with the western line of the *cul de sac* common fields, or any other interior line of the commons. Nowhere do these lines coincide or meet each other.

3. Brown's survey of the out-boundary not undertaking, nor even authorized, to fix the locality of the *cul de sac* common fields, not making any connection with them at any point, and only introducing them by way of diagram upon the plat, there cannot of course exist any conflict between the respective surveys of these two different localities; nor can

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the former sustain or prove the validity of survey No. 164.

4. The lease itself from the City of St. Charles to plaintiffs shows that the title of the latter originated in 1831.

II.—1. The office of a survey is not to supersede the original grant, but merely to ascertain its locality. It can neither enlarge nor diminish the rights of grantees; and in as far as it assumes to do either, it is null and void. The survey No. 164 making a parallelogram of 324 arpens, must therefore succumb to the grant of a wedge-shaped figure, whose boundary lines, by the simple rules of arithmetic, can only contain 162 arpens. (*Ott v. Soulard*, 9 Mo. 581, 603; *Boyce v. Papin*, 11 Mo. 25; *U. S. v. Huertas*, 8 Pet. 475; *U. S. v. Levi*, 8 Pet. 481-2; *U. S. v. Huertas*, 9 Pet. 171; *Smith v. U. S.* 10 Pet. 326, 331; *U. S. v. Forbes*, 15 Pet. 173, 182; *U. S. v. Breward*, 16 Pet. 146; *Orrick v. Bower*, 29 Mo. 210; *Kissell v. Pub. Schools*, 16 Mo. 586; *Jourdan v. Barrett*, 13 La. 43; *Kittridge v. Landry*, 2 Robinson, La. 78.)

True, as to this point, there is sometimes a distinction between the recognition, by way of grant or confirmation, of an existing claim, and an original grant coupled with a condition that it is to be located by future survey. In the latter case only the survey is conclusive. But the commons grant, under the act of 1812, belongs to the former and not to the latter class. (*Magwire v. Tyler*, 25 Mo. 484; *Dent v. Sigerson*, 29 Mo. 513; *Carondelet v. St. Louis*, 25 Mo. 448, 460-62 S. C.; 1 Black., U. S. 187.)

Even in cases where the survey is conclusive as between the United States and the grantee, it is not so as to third parties (as the plaintiffs in this case), who are not estopped thereby. (*Menard v. Massey*, 8 How. 293, 314.)

The survey of the out-boundary could have no effect whatever upon the lines of the claims lying within it. Its only object and effect were to sever the confirmed claims "in a mass" from those lying *without* it. (*Mackey v. Dillon*, 4 How. 446; *Milburn v. Hortiz*, 23 Mo. 532-8; *Tayon v. Hardman*, 23 Mo. 539-43; *Schultz v. Lindell*, 24 Mo. 567-70; *Kissell v. Pub. Schools*, 16 Mo. 587.) And yet the fourth

instruction given for defendants assumes as a *fact proven* that this survey verifies survey 164, and that the acceptance of one binds the city and its grantees to the other.

2. The act of June 13, 1812, was a conclusive grant of the commons as they then existed, with no reservation or condition as to any future survey; and no authoritative survey shows how or where they then existed, with reference to the interior lines, other than the Spanish survey of Mar. 2, 1804. (*Glasgow v. Hortiz*, 1 Black., U. S. 595; see also authorities above cited.)

III. The alleged estoppel against plaintiffs had no foundation in fact or in law: Because,

1. The evidence shows that the plaintiffs' title from the city arose long prior to the assumed acts of acceptance of the survey on the part of the latter.

2. The plaintiffs were in no sense parties, nor was the city corporation, to the survey of the Lacroix claim, and therefore could not be estopped by it.

3. The survey of the out-boundary not affecting the line in controversy, neither the city nor its grantees could, by any acceptance of that survey, be estopped touching the line in controversy.

4. The defendants are not authorized to set up the alleged estoppel, since they show no sort of connection in themselves with the subject matter; not showing title in themselves under the United States, and not being parties or privies to the alleged acts of estoppel. (*Cottle v. Sydnor*, 10 Mo. 763.)

IV. The instructions given for defendants are all erroneous, as inconsistent with the foregoing propositions. The first instruction assumes the acceptance of the survey of the out-boundary by the city as a fact proven. The second instruction affirms the acceptance as a conclusion of law, when it ought to have been left as a question of fact for the jury to decide. (*Carondelet v. McPherson*, 20 Mo. 205.) The fourth instruction is erroneous in assuming the application of the survey of the out-boundary to the land in controversy, and

the acceptance thereof by the city, as affecting the boundary lines involved in this suit.

Whittelsey, for respondents.

I. The confirmation of a lot by the act of June 13, 1812, although within the commons, vests the title in the confirmer as against the inhabitants of the town. The act does not confirm as commons all land within the out-boundaries of the survey, but only such part as was commons on the 20th December, 1803. Land previously granted, or lots inhabited, cultivated, or possessed, as private property, remained such; and if an out-lot, or common-field lot, was confirmed as private property. (Page v. Schiebel, 11 Mo. 167; Soulard v. Allen, 18 Mo. 590; St. Louis v. Toney, 21 Mo. 243; Harrison v. Page, 16 Mo. 182; Macklöt v. Dubreuil, 9 Mo. 473; Boyce v. Papin, 11 Mo. 16; McGill v. Somers, 15 Mo. 80; Guitard v. Stoddard, 16 How. 494.

II. The official survey No. 164 is a part of the confirmation, and is *prima facie* evidence of the location of the lot as cultivated and possessed.

a. The confirmation is according to cultivation and possession, and not according to grant. (Authorities above cited; Janis v. Gurno, 4 Mo. 458; Guitard v. Stoddard, 16 How. 494; McGill v. Somers, 15 Mo. 80.)

b. The survey conforms to the lines of the neighboring lots in the *cul de sac* common fields, and was made according to the possession. (Authorities cited above.)

c. The survey of the lot made in 1796 calls for 324 arpens, and as the tract was 36 arpens deep, that made a lot of 9×36 arpens, in a rectangular form, corresponding with the adjoining lots, and has been so surveyed by the United States, first in 1817, and then by Brown in 1844. (Act Cong. Ap. 29, 1816; 1 Land L. 278; act May 26, 1824; 1 Land L. 397, § 2, and authorities above cited.)

III. The patent certificate with the survey attached is *prima facie* evidence that the land embraced within the survey was a common-field lot, and that it was cultivated and

possessed as such prior to Dec. 20, 1803; and the defendants being in possession, the burden of proof was upon the plaintiffs to show that the survey did not correctly locate and define the boundaries of the land confirmed. (McGill v. Somers, 15 Mo. 80-87; Soulard v. Allen, 18 Mo. 590, 596-7; St. Louis v. Toney, 21 Mo. 243, 252; act Apr. 29, 1816, 1 Land L. 281, § 3; act May 26, 1824; 1 Land L. 398, § 3.) This was the whole effect given to the certificate by the defendants' instructions.

The defendants further brought themselves within the case of Vasquez v. Ewing, 24 Mo. 31, by proving the actual possession and cultivation prior to Dec. 20, 1803.

IV. The lease under which plaintiffs claim title, made in 1856, is so defective in its description of the premises conveyed, that it must almost be considered as void for uncertainty of description. (Bell v. Dawson, 32 Mo. 79.) At any rate, the burden of proof was upon the plaintiffs to show that their deed embraced the *locus in quo*, and this warranted the fifth instruction given for defendants.

V. The official U. S. survey of the commons, upon which the *cul de sac* fields were laid down in the locality claimed by defendants to be correct, was *prima facie* evidence that said fields were correctly located; and if the Town of St. Charles had assented to and accepted said survey prior to the date of plaintiffs' deed in 1856, it is conclusive upon the town and all claiming under them after said acceptance. (Carondelet v. St. Louis, 29 Mo. 527, S. C.; 1 Black. 179; Carondelet v. McPherson, 20 Mo. 192.) The evidence shows that the town had assented to and accepted the United States survey, which included more land than Soulard's survey in 1804.

VI. The survey of Soulard was but a private survey, not a public official survey, as it was made after the change of government. (Act Cong. Feb. 28, 1806; 1 Ld. L. 133, § 3.) The grant of Delassus made in 1804 was void as a grant, having been made after the change of government, Ap. 30, 1803. (Act Mar. 20, 1804; 1 Land L. 114, § 14.) The instructions asked by plaintiffs in relation to the effect of Soulard's

survey were therefore correctly refused. At the date of the trial of Chouteau v. Eckert, 2 How. 344, Brown's U. S. survey had not been made, and there was no dispute as to the correctness of Soulard's survey by Chouteau's claiming under the act of July 4, 1836.

HOLMES, Judge, delivered the opinion of the court.

The defendants were in the actual possession of the land in controversy, and gave evidence of a possession of long standing, under a claim of title. There was no evidence that the plaintiffs, or those under whom they claimed, ever had been in the actual possession of the land sued for; they depended solely upon a right to the possession resulting from superior title.

At the close of the evidence, the plaintiffs asked the court to instruct the jury (among other things), "that the acts of Congress of the 13th of June, 1812, and the 27th of January, 1831, confirmed to the inhabitants of the town of St. Charles and vested in them the legal title to their commons as claimed by them and spread upon the records of the Government, and that the survey of the said commons made and certified prior to the 10th day of March, 1804, by the proper officer, is *prima facie* evidence of the true location, extent and boundary of said commons"; which instruction the court refused. One of the instructions, given at the instance of the defendants, declared that "although the jury may find from the evidence that Evans' survey of lots Nos. 14 and 20 of block 4, as claimed by plaintiffs, runs into and interferes with approved U. S. survey No. 164, given in evidence by defendants, yet unless plaintiffs have shown title to the interference now in controversy they cannot recover in this action."

These instructions raise the question whether, upon the evidence before the jury, the plaintiffs had shown any title to the land in controversy. The only evidence of a title to commons in the Town of St. Charles, under whom the plaintiffs claimed, that appears in this record as a basis for the instructions which were asked by the plaintiffs, was the plat

and certificate of survey of the commons of the town of St. Charles by Antoine Soulard, the Spanish surveyor, dated March 2, 1804 ; and the purport of that instruction for the plaintiffs must be taken to be, that said survey was not only evidence of "the true location, extent and boundary of said commons," but also of the fact that a right, title and claim to commons with that definite extent and boundary had existed in the Town of St. Charles prior to the 20th day of December, 1803, on which the act of Congress of the 13th of June, 1812, operated as a grant of title. It has been decided that the act of Congress and an approved official survey by authority of the United States were equivalent to a patent of the tract of land so surveyed as commons. (*Le Bois v. Brammell*, 4 How., U. S. 449.) But no such effect can be given to the survey of Soulard, made before the act was passed, even if it could be considered as having been made by Spanish authority before the change of government. As such, it could only be used as evidence to prove the fact, that prior to the 20th day of December, 1803, a right, title and claim to commons had existed in the Town of St. Charles with the extent and boundary therein designated, on which the act of Congress could operate as a grant of title. As a survey merely, it speaks from the date of its completion. The act of Congress did not purport nor intend to confirm a claim to commons which existed only on the 2d day of March, 1804, but only such commons as existed in fact prior to the 20th day of December, 1803.

This survey and certificate were admitted in evidence without objection, and we have only to consider the effect of it as evidence. The certificate of Soulard cannot be allowed to speak as a deposition of a witness as to extraneous matters recited in it; nor, if it could, does it contain any statements of fact from which a jury would be warranted in inferring that a right, title and claim to commons had existed in fact prior to the 20th day of December, 1803, and with the extent and boundary mentioned in the plat and certificate. It certifies only that a tract of land was surveyed and bounded, in

presence of the syndic and inhabitants of St. Charles, as represented in the plat, according to their petition therefor, dated Jan. 18, 1801 (the nature of which is not stated), and the decree of the Lieut. Governor by which he was "ordered to put them in possession of a sufficient quantity of land to serve them as common," which survey being completed now on the 2d day of March, 1804, shows a tract containing 14,000 arpens of land with the boundaries described; and it is further said that the survey had been made in conformity with the decree of the late Lieut. Governor dated the 26th of February, 1801, and that the whole had been laid down from the field notes of his deputy dated the 27th of February, 1804. The inference to be drawn from all this is, that no definite tract of land had existed as a common, or been claimed or possessed by the inhabitants of the town, until this survey was completed; though it would appear that he had previously obtained authority to survey, designate and put them in possession of a sufficient quantity of land to serve them as a common.

In the absence of any official survey of commons by authority of the United States, the only way in which a title to commons under the act of Congress of the 13th of June, 1812, can be shown is by proof of some grant, concession, survey, or actual possession, claim, or user, of some definite tract of land as commons prior to the 20th day of December, 1803. Without such evidence, there can be no title to commons, under that act, where no official survey is shown.

In *Chouteau v. Eckert*, 2 How. (U. S.) 844, several documents were in evidence tending to show an actual concession, claim, and possession of commons, with the definite extent and boundary, which were afterwards accurately marked by the survey of Soulard, and that the commons of the town had been enclosed by a fence as early as 1798, including the lot in controversy in that case; and the court said, "the whole of the claim is included in the village common of St. Charles as it existed on the 20th day of December, 1803." The St. Charles common was indirectly alluded to in *Caron-*

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delet v. St. Louis (1 Black. 189), in which it was remarked that this common "had been accurately and carefully surveyed and the boundaries marked by Soulard, the Spanish surveyor" (2 How. 850), and that "no question of boundary was involved in the controversy" in that case (Chouteau v. Eckert). This was true; but the observation must be understood, of course, as made in reference to the actual proofs shown in that case, and it will not warrant the assumption that the court intended to place this survey of Soulard on an equal footing with an official survey by authority of the United States, expressly made as a survey of the commons which was granted by that act.

In the case of Bird v. Montgomery, 6 Mo. 510, documentary evidence of like character was introduced (together with the survey of Soulard) clearly showing an actual claim and concession of commons existing in fact as early as 1801, with the definite boundaries afterwards designated by the survey. It was insisted by the defendant in that case, "that the act of 1812 operated to confirm the titles of claimants only when there was a grant from the Spanish Government, or such long use and enjoyment of a specific quantity of land as would amount to a grant." The court held this position to be correct, if the word *grant* were understood to include inchoate titles and concessions, and all such rights, titles and claims as were the subjects of the act of Congress; and it was added, that "in this case there was not only a claim to an indefinite quantity of land as far back as 1796, and which was recognized by the proper authorities of that day, but a more distinct and definite claim set up in 1801, and expressly conceded by the proper officer so far as he had authority to make such a concession." The documents that appeared in evidence were considered as having fixed and established the claim to commons with definite boundaries as a right, title and claim existing prior to 1803, as it was also actually surveyed by Soulard before the transfer of Upper Louisiana in 1804; and as such claim so proved, it was held to have been confirmed by the act. It is clear that this conclusion

was based upon the actual proof of an existing commons prior to 1803, and not merely upon the survey of Soulard dated in 1804. It was further said, that the evidence offered was sufficient to show an actual user of commons of an indefinite extent as far back as 1776, and that "in 1801 the claim and the user were reduced to certainty by a petition containing a special description by metes and bounds, and a consequent survey in 1804." But it is not to be inferred that the survey alone was considered as being any evidence of such user or claim prior to the 20th day of December, 1803.

The conclusion must be that there was no evidence before the jury, in this case, of any title whatever to commons in the Town of St. Charles at the date of the plaintiff's lease. It follows that there was no error in the ruling of the court upon the instructions in question; and, indeed, that the only instruction that could properly have been given, would have been to the effect that the jury should find for the defendants.

It was not claimed on the part of the plaintiffs that the survey and plat of the out-boundary line of the town of St. Charles, under the act of 13th June, 1812, was a survey of the commons, or any evidence of the location, extent and boundary of the commons; though some of the defendants' instructions affected to treat it as such, and as a survey of the private lots marked on the plat. It can hardly be necessary to say, that this was no survey of any tract of land for the land as commons, or for an individual as a private lot. (*Kissell v. Schools*, 16 Mo. 587; *Glasgow v. Hortiz*, 1 Black. 595.)

There is no occasion that we should proceed to review in detail the numerous instructions that were given or refused on either side. In reference to those which related to the defendants' title by the certificate of the U. S. Recorder of land titles, on proof made before Recorder Hunt under the act of 28th of May, 1824, and a survey thereon, it may be observed, that until the plaintiffs can show some title in themselves to the land in controversy, they will not be in a position to question or dispute the *prima facie* title shown by those documents, however erroneous that survey may have

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been; upon which we are not now called upon to express any opinion. It is, at least, conclusive upon the Government while it stands as a survey, and upon all mere intruders and strangers without any title to the same land. (McGill v. Somers, 15 Mo. 80.)

Judgment affirmed. The other judges concur.

ZENON KNOWLTON, Appellant, v. LOUIS C. SMITH, Respondent.

1. *Administration—Conveyance.*—Under the act (R. C. 1835, p. 83, §§ 20, 21 & 25) it was not necessary that the deed of the administrator, conveying the land of the decedent under a sale made by order of the probate court, should recite the fact of the report of sale and its approval by the court. The deed reciting the order of sale and sale would be *prima facie* evidence of title, and it rests upon the party controverting the effect of the deed to prove affirmatively that the sale was not approved.
2. *Estoppel—Conveyance—Agreement.*—Parties agreeing upon a division line between their respective lands, are not estopped by such agreement if it be entered into under a mistake of facts, provided the rights of innocent third parties have not intervened in consequence thereof.
3. *Limitations—Adverse Possession—Estoppel.*—The possession required by the statute must be with the intent of asserting an adverse title. Therefore when parties designate their division lines through ignorance or mutual mistake, the possession held by either will not be adverse.

Appeal from St. Charles Circuit Court.

This was an action of ejectment for about fifty-two acres, being part of United States survey No. 1692, originally granted to Antoine Prieur. The whole survey became the property of William P. Clark, whose administrator, in 1842, sold it in two equal portions; the western half to John P. Belton, under whom the plaintiff claims, and the eastern half to Francis Yosti, under whom the defendant claims. It did not appear that any dividing line was run at this time, nor did the administrator's deeds to the parties give any courses or distances, merely referring to an equal division of the tract of 800 arpens, and describing the Belton tract as lot No. 2, containing 400 arpens, and the Yosti tract as

36	507
116	394
36	507
153	6
86	507
171	243

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lot No. 1, containing 400 arpens. The testimony tended to show that after the sale, but before the execution of the deeds, Belton and Yosti had a division line surveyed and run by one Wardlaw, and expressed themselves contented therewith and agreed to abide by it.

Defendant's testimony tended to show that his possession at the commencement of the suit extended only to this Wardlaw line; rebutting testimony was introduced by plaintiff, tending to show that defendant's possession extended over on plaintiff's side of the Wardlaw line.

Plaintiff's testimony tended to show that, although Wardlaw's line divided the tract equally, as he located the outer boundaries, yet in fact he did not correctly ascertain those boundaries according to the United States survey, but made the tract larger by about fifty acres than it really is; that, as a result of this error in the out-boundaries, Wardlaw located the division line too far over on the plaintiff's side, sufficiently to embrace the land in dispute or the greater part of it. The testimony also tended to show that the true location of a dividing line, in accordance with the United States survey, showed the land in controversy to be on the plaintiff's side of such true line, and that it was in defendant's possession at the commencement of the suit. It was not claimed by plaintiff that his title papers, exhibited in evidence, vested in him more than an undivided half of the land in dispute. The testimony tended to show that in 1843, one Joseph Blair held possession under a contract of purchase from Thomas W. Cunningham, of the eastern half, now held by defendant; that, finding himself unable to complete his purchase, and being informed that the western half was likely to become the property of his wife by a gift from her grandfather, he moved some rails cut by him on the eastern half over on the western half, and there built a fence with them, thus, for the purpose of saving the rails, virtually extending his possession a considerable distance over the line, and so as to include the land in controversy, or more. The evidence also tended to show that this fence was moved back again, but

there was some conflict as to whether this last operation restored the possession to the Wardlaw line, or to a line west of it.

It was contended by the plaintiff, that this extension of possession by Blair, for the mere purpose of saving his rails, and not as an act of ownership or assertion of title, could not be considered in giving effect to the defendant's plea of limitation. The deed from William P. Clark, administrator to John P. Belton, exhibited by plaintiff as a link in his chain of title, contained no recital of the report of sale made by the administrator, nor of an approval of such report by the probate court. The deed from Francis Yosti to Thomas W. Cunningham, exhibited by defendant, described the land conveyed as the "eastern half of survey No. 1692, and designated as lot No. 1 in the division," &c. Referring further to the sale by William P. Clark's administrator to Yosti, "and containing, by late survey, four hundred and twenty-nine acres, be the same more or less."

The court gave, on plaintiff's application, the instructions sustaining his position as to Belton's temporary occupancy of part of the western half of the survey, but refused the instructions asked for by plaintiff to the following effect:

1. That the plaintiff's chain of title was sufficient to establish his ownership of an undivided half of the land sued for, unless defendant had shown a paramount title by the statute of limitations or satisfactory proof of an agreed line.

2. That if Wardlaw's division line was mistaken or erroneous, and was agreed upon by the parties in ignorance of the true facts of the case, and in consequence of such mistake, it was not binding on the parties as an agreed line, but the rights of the parties should be determined by the true division line.

3. That if it appear that plaintiff and defendant were entitled to equal halves of survey 1692, the respective rights of the parties should be determined by a line so dividing the survey.

4. That even if there was a valid agreement as to the

Wardlaw line, yet if at the commencement of the suit the defendant's possession extended over that line, the plaintiff was entitled to recover an undivided half of the land so encroached upon by defendant.

The court gave, on defendant's application, instructions embodying the following propositions:

1. That the deed from William P. Clark, administrator to Belton, was void for want of a recital of the administrator's report of sale and its approval, and for want of any other proof of such report and approval.

2. If it appear that a division line was agreed upon between Belton and Yosti, and that the respective claimants have since continuously held possession according to that line, then both parties are estopped from disputing such line and the plaintiff cannot recover.

3. That possession under the deed from Yosti to Cunningham, if for a sufficient length of time, and adverse, and including the land in controversy, was sufficient to sustain the plea of limitation.

The plaintiff took a non-suit, with leave to move, &c. upon the overruling of which motion, he took an appeal.

E. A. Lewis, for appellant.

I. The plaintiff's chain of title was at least *prima facie* complete, and could be controverted only by paramount title shown in defendant.

II. The court erred in refusing the second and third instructions asked by plaintiff. Agreements establishing boundary lines are, like all other agreements, of no binding force upon the parties if founded upon mutual mistake in material fact. (*Menkens v. Blumenthal*, 27 Mo. 198; *Fredrick v. Brulard*, 6 La. An. 382; *Gray v. Couvillon*, 12 *id.* 730; *Westly v. Sargent*, 38 Me. 315; *Carroway v. Chacey*, 2 Jones' Law, 170; *Cunningham v. Roberson*, 1 Swan, 138.)

III. The deed from Clark's administrator to Belton contained every recital required by the statute in force at the time. (B. C. 1835, p. 53, §§ 22-3.) The law declares that

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"such deeds shall convey all the title," &c.; not that such deed, "together with proof" of the precedent steps, shall have that effect. In the absence of proof to the contrary, the legal presumption is that all the precedent requisitions were complied with. (*Grignon v. Astor*, 2 How., U. S. 319; *Jackson v. Jenkins*, 4 Wend. 436; *Snyder v. Marshall*, 8 Watts, 416; *Overton v. Johnson*, 17 Mo. 442.) Nor can this presumption be questioned in a purely collateral proceeding. The cases of *Vallé v. Fleming*, 19 Mo. 454; *Speck v. Wohlein*, 22 Mo. 310, and *Bank v. White*, 23 Mo. 342, furnish no authority for this case.

Whitelsey, for respondent.

I. The deed of the administrator did not recite that he had made report of his proceedings under the order of sale, and that his report had been approved, nor did the plaintiffs offer in evidence the record of the St. Louis probate court to show such approval. The R. C. 1835, p. 33, §§ 20-1-2, require the administrator to make full report of his proceedings at the next term of the county court after the sale, and declare that if said sale be not approved, the proceedings shall be void. The judgment of the court approving the proceedings are absolutely essential to the validity of the sale; and if there be no such approval the sale is void, and no deed from the administrator can convey the title without such approval. The evidence of such approval should have appeared either from the recital in the deed or from the records of the court. (*Vallé v. Fleming*, 19 Mo. 454; *Speck v. Wohlein*, 22 Mo. 310; *Bank v. White*, 23 Mo. 342.)

II. The parties are estopped by the action of the respective grantors, Yosti and Belton, and the action of the parties under such action. The defendants have been in actual possession of the premises sued for since May, 1843. Yosti conveyed to Cunningham 429 acres, and Cunningham conveyed and warranted to Smith the quantity of 429 acres, and Smith has been in possession since 1850, claiming under his deed. (*Taylor v. Zepp*, 14 Mo. 482; *Blair v. Smith*, 16 Mo.

278 ; see the instructions in that case ; *Hempstead v. Easton*, 33 Mo. 142 ; *Boyd v. Graves*, 4 Wheat. 513.)

III. The plaintiff's deed from Clark's administrator calls for lot No. 2, as made by the appraisers as per report on record. No such plat was produced on the trial, to show the lines of the lot No. 2. The only evidence of a division of the tract was Wardlaw's survey in 1842, and by that the defendant is in possession, and by that only. (*Johnson v. Prewitt*, 32 Mo. 558.)

IV. The instructions upon the statute of limitations were correctly given. (*Biddle v. Mellon*, 13 Mo. 335 ; *Blair v. Smith*, 16 Mo. 298 ; *Callaway County v. Nolley*, 31 Mo. 393 ; *Johnson v. Prewitt*, 32 Mo. 558 ; *Schultz v. Arnot*, 33 Mo. 172.)

WAGNER, Judge, delivered the opinion of the court.

The chief error complained of is the second instruction given by the court below at the instance of the respondent, that the deed from Clark's administrator to Belton did not show that the administrator ever made any report of his proceedings in the sale of the land, nor that said report was ever approved by the probate court ; and that as no evidence was offered or introduced showing that said report was ever confirmed or approved, the deed was void, and passed no title on which plaintiff could recover. The proceedings in the probate court, and the sale by the administrator, took place in the years 1842 and 1843, and were consequently governed by the code of 1835. That law required that the administrator or executor, at the next succeeding term of the court after sale, should make full report of his proceedings, with the certificate of appraisement and a copy of the advertisement verified by affidavit, &c. ; and if such report and proceedings of the executor or administrator were not approved by the court, the proceedings were to be void ; but if they were approved, the sale should be valid, and the executor or administrator, as soon as full payment should be made of the purchase money, should execute, acknowledge and deliver

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to the purchaser a deed, stating the order of sale and the court by which it was made and the consideration.

It is contended that as no recital is made in the deed that the court approved the proceedings, the conveyance is void, or, at least, can only be upheld by showing from evidence *aliunde* the approval of the court in the premises. It is sufficient answer to this to say, that the statute did not require such recital. All that was necessary according to the then existing law, was to state the date of the order of sale, the court by which it was made, and the consideration, and these are all embodied in the deed. This compliance with the law was sufficient to make the deed *prima facie* evidence, and the *onus* of proof to destroy its validity devolved on those who attacked it. A liberal construction will be indulged to uphold judicial sales, and where the proceedings appear regular on their face, they will be presumed to be correct in the absence of rebutting facts and circumstances.

In *Vallé v. Fleming*, it was shown affirmatively by the record, that the law had not been complied with, and that the jurisdiction of the court had never attached. (19 Mo. 454.) And in suits of this description it is not competent for third persons to impeach the deed collaterally; it can only be done by the parties or their privies in a proceeding to set it aside, or have it cancelled, or by their creditors in attacking it for fraud.

It is claimed that the parties having agreed upon a division line, and occupied each his own part respectively on the faith of that agreement, that they are estopped and concluded from asserting any other line. If the agreement was made and entered into under a mistake of facts, a party is not precluded from claiming his rights, as under such circumstances there is no presumption of his surrender, or waiver of rights given up under a misapprehension. Whilst parties cannot avail themselves of any defence where they have entered into a contract through mistake or ignorance of law, it is different as to a mistake or ignorance of facts, provided the rights of innocent third persons have not inter-

vened in consequence thereof; and this virtually disposes of the plea of the statute of limitation.

The possession required by the statute must be with the *intention* of asserting an adverse title. It is the occupation with an intent to claim against the true owner that makes the possession adverse; therefore, where parties designate their division lines through ignorance, inadvertence or mutual mistake, the possession held by either will not be adverse. Questions of adverse possession thus depending upon the intention of the possession are questions of facts as well as law, to be determined by a jury as the best means of ascertaining the truth, under proper instructions from the court. Lord Mansfield says: "disseisin is a fact to be found by a jury (*Taylor v. Horel*, 1 Burr. 60); but if the jury return a verdict only that the defendant has held quiet possession of the demanded premises for more than twenty years, such verdict cannot, by legal intendment, be considered as establishing the alleged fact of disseisin. (*Pejepsco Proprietors v. Nichols*, 1 Fairf. 256.) There must be something more than mere possession; there must be shown an intention to possess and occupy adversely to the true owner.

Having indicated our views on all the material questions that can arise in the trial of this cause, it is not necessary to notice the instructions in detail.

The judgment is reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.



**JOSIAH THORNBURG, Plaintiff in Error, v. CHAS. JONES AND
JAMES M. MING, Defendants in Error.**

Action—Deed of Trust—Power.—A. sued the trustee in a deed of trust, and the holder of the notes thereby secured, alleging in his petition that by the power notice of the sale was to be given by advertisement inserted in newspapers printed in St. Louis and Franklin counties, and that notice was only published in Franklin county; and alleging also, that, by the wrongful, oppressive and fraudulent conduct of the holder of the notes, in combination

26	514
117	32
36	514
120	427
36	514
159	328

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with the trustee, bidders were deterred from bidding, the property was sacrificed, and brought less than parties were ready and willing to bid for it: *Held*, that as by the petition it appeared that the sale was void both in law and equity, no action at law for damages could be sustained.

Error to St. Louis Court of Common Pleas.

The petition stated that on the 25th day of April, 1859, Hickman and Moore were seized in fee of certain tracts of land situate in the county of Franklin, &c.; and being so seized, Hickman and Moore, by deed of trust, conveyed the said real estate to Ming, as trustee, to secure the payment of four notes, executed by Hickman and Moore, dated April 15, 1859, each for the sum of fifteen hundred dollars, and payable to the order of one James W. Wilson, at the Bank of the State of Missouri, in St. Louis; one of said notes being due twelve months after date, one due two years after date, one due three years after date, and the other due four years after date. It was provided in the deed of trust, that if the notes, or either of them, should not be paid at maturity, then the said Ming, or his legal representatives, or, in case of death or absence from the State, the sheriff of the county, might proceed to sell the said property, or any part thereof, at public vendue to the highest bidder, at Union, in Franklin county, for cash, first giving thirty days' public notice of the time, terms and place of sale, and of the property to be sold, by advertisement in some newspaper printed in St. Louis and Franklin county; and upon such sale shall execute and deliver a deed in fee simple of the property sold to the purchaser or purchasers thereof. That in March, 1860, Hickman and Moore sold and conveyed the said real estate to plaintiff, subject to said deed of trust; that the said Hickman and Moore, in the year 1859, paid in full the said note due one year after date, and also paid three hundred and ten dollars on said note due two years after date, and which amount was credited on said note as paid on the 15th of April, 1859; and that after the said payment Wilson sold the three notes—one due two years after date, one due three years after date, and the other due four years after date—to Charles Jones, for

value received ; that on or about the 11th day of October, 1860, the said Ming, at the instance of the said Jones, the owner and holder of said notes, caused an advertisement to be published in some newspaper, the name of which is unknown to plaintiff, printed and published in Franklin county, that he would on the 28th November, 1861, in the town of Union in said county of Franklin, proceed to sell the said real estate for the purposes mentioned in said deed of trust ; that on the 28th day of November, 1861, the said Ming exposed the said real estate in a lump, or as a whole, for sale at public vendue in said town of Union, and the same was purchased by the said Jones, at the price and sum of twenty-seven hundred dollars ; that the said advertisement was not inserted or printed in any newspaper, or published in St. Louis. That at the time of said sale the said real estate was worth ten thousand dollars ; that the makers of said notes, and the endorser thereof, are all good for the said amount of said notes, and are solvent and able to pay the said notes. That the said defendants maliciously combined and confederated together to prevent persons from bidding at said sale, in order to buy the said real estate at as low price as possible ; that said defendants, in the said advertisement, recited that the sum of fifteen hundred dollars and interest was due on said note, when in fact there was only eleven hundred and ninety dollars and interest as aforesaid. And the said Ming and Jones, combining and confederating for the purpose and with the intent of defrauding, oppressing and overreaching plaintiff by sacrificing his said property, and getting it at a greatly and grossly inadequate and reduced price, put up said property for sale as aforesaid, and while said sale was being cried by public vendue, the said Ming, at the instance and under the direction of said Jones, and in combination and confederating with him, with the intent and for the purpose aforesaid, publicly proclaimed and made known to all the bidders and persons then present at said sale, that whoever purchased said real estate would be required to pay the whole amount of the bid, and the purchase money of said land,

in gold, immediately upon the said land being knocked down to him, and before any deed was made or could be made. And there were then and present at said sale bidders, who had been bidding for said land at said sale when the said proclamation was made and wished to purchase the same, who stated to defendants that they had gold coin to pay for said land if they purchased it; but that the coin was not then present at the place of sale, but would be ready to be paid over to said Ming as soon as he was prepared to execute and deliver a deed for the land.

Whereupon said Jones proclaimed and stated in the hearing of said bidders at said sale, that he would not trust Jesus Christ, and that the gold would be required immediately upon the bidding off or knocking down of said land at said sale. And the said Ming went on crying the said sale of said land, after the statement and proclamation aforesaid, under the influence and agreeably to the terms of said statement and proclamation; and thereupon and by means thereof the various bidders upon said land then present, and who had been bidding upon said land before said statement and proclamation, as well as other persons then and there present, became and were overawed and frightened, and failed to bid further upon said land; by reason thereof the said land was bid off and purchased by said Jones, at the grossly inadequate sum of twenty-seven hundred dollars for the whole of said land, which was reasonably worth at the time of said sale the sum of ten thousand dollars; and that said land at said sale, but for the fraudulent combination and interest of the defendants, and the outrageous manner in which they conducted the sale, and the violent declarations and statements made by said Jones as aforesaid, and the unlawful, unfair, oppressive and fraudulent manner in which said sale was effected and conducted, would have brought the sum of \$4,500; and if the said sale had been fairly conducted and made, the said land would have brought the sum of \$4,500; that in the manner and form aforesaid, and by the means aforesaid, the defendants have wilfully, maliciously, and fraudu-

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lently overreached and defrauded the plaintiff out of and sacrificed his said land as aforesaid, and has fraudulently converted the same to the use of him the said Jones; whereby the said plaintiff has been damaged in the sum of seven thousand five hundred dollars, for which, with his costs, he prays judgment.

The defendants demurred to the amended petition, for the reasons—

1. That plaintiff asks for judgment against the defendant Jones for a sum of money, whereas by the statement in the petition, if true, it is shown that no valid sale of the premises therein mentioned was made.

2. By the statements in said petition the said plaintiff states, there is unpaid upon the notes mentioned in the petition, as avowed by defendant Jones, more than forty-five hundred dollars; but plaintiff makes no offer to pay said notes, or any part of them.

3. Because it is shown and averred in and by said amended petition, that the value of the land is not so great as the amount admitted in said petition to be unpaid.

4. Because the facts as shown in said petition prove no fraud or combination, or in any manner invalidate the sale.

The court sustained the demurrer, and the plaintiff appealed.

Whittelsey and *Hamilton*, for plaintiff in error.

I. As the trustee Ming had the legal title in the land, he could convey that title, and although the sale might have been set aside by a court of equity on account of the wrong conduct of the trustee and his *cestui qui trust*, that would not prevent the plaintiff from suing for the damages sustained by him, caused by the misconduct of the defendants.

Such suit was sustained in the case of *Dozier v. Jermain*, 30 Mo. 216. See also *Howard v. Ames*, 3 Metc. Mass. 308; *Lowell v. North*, 4 Minn. 82.

That the trustee can convey the legal title—4 Kent's Com. 310; *Gale v. Mensing*, 20 Mo. 461; *Slevin v. Brown*,

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82 Mo. 176; Wilcox v. McKinney, 10 Mo. 229; Clark v. Maguire, 16 Mo. 802; Miles v. Davis, 19 Mo. 408; Gibbons v. Gentry, 20 Mo. 468; Richardson v. Means, 22 Mo. 495; Thompson v. Lyons, 83 Mo. 219.

A judgment for plaintiff for damages would bar a suit in equity to set aside the sale.

II. The defendants' third point of demurrer is based upon a misconception of the facts stated in the petition. The value of the land is stated to be ten thousand dollars, more than twice the amount due at the date of the sale. It is alleged that there were persons present ready to bid four thousand five hundred dollars for the property, which defendant Jones purchased for \$2,700.

III. The plaintiff suing for damages, was not bound to tender the amount secured by the deed of trust.

A mortgagee filing a bill to redeem, is not compelled to make a tender of the debt. (Quin v. Brittain et al., 1 Hoff. Ch. 355; Ulrici v. Papin. 11 Mo. 42.) Plaintiff was not bound to tender the debt. (Stebbins v. Hall, 29 Bark. 555.)

IV. The petition shows a good cause of action. The conduct of Jones, the *cestui qui trust*, was oppressive and unjust. The trustee Ming should have stood indifferent between the debtor and creditor, and have secured as high a price as possible.

To demand coin *instante* was a gross fraud upon the debtor and the plaintiff, more especially under the well known condition of public affairs at the time.

To demand specie *instante*, at a mortgage sale, is held oppressive, and sale set aside. (Goldsmith v. Osborne, 1 Edw. Ch. 562.) As to conduct of sales, see Conway v. Nolte, 11 Mo. 74; Stine v. Wilkson, 10 Mo. 75; commenting upon the conduct of trustees' sales. (11 Am. L. Reg. 712, § 20.)

The action of the defendants at the sale was a fraud upon the rights of the debtor and of the owner of the equity of redemption. The trustee should not have acted upon the direction of the *cestui qui trust*, but should have considered the interests of the plaintiff and of the debtor.

Glover & Shepley, for defendants in error.

I. By the petition it clearly appears that the trustee did not comply with the terms by which he alone was authorized to sell and convey, and thereby Jones acquired no title to the land.

II. It is apparent from the statements of the petition that there remains unpaid more than \$4,500 upon the notes secured by the deed of trust, subject to which he took the deed, and he is asking for damages for the sale of the land to its full value, without offering to pay what is unpaid.

If the petition is true, the land is worth enough or nearly enough to pay the entire debt; so that, if the sale is set aside, Jones, the holder of the notes, has security upon the land sufficient to pay his whole debt; but the plaintiff does not desire to have it set aside, but to recover damages of Jones and Ming—damages for the difference between what it brought at the sale and what he says was the value; and when he recovers this from Jones, leaves Jones to sue Hickman and Moore, and they can then set up these same facts, if they exist, as a defence to a suit on these notes.

III. As it is stated that the land was security for the whole debt, as far as the purchaser, Thornburg, is concerned, there could no possible damage come to him unless the value of the land was greater than the debt. If the land brought less than the debt, it might have been the misfortune of the *cestui qui trust*; but if the value was not greater than the debt, the whole land must be absorbed in paying the debt, and there can be no residue for the owner; therefore he cannot be damnified by any possibility.

IV. If the statements of the petition made any case at all for equitable interference or legal remedy, they make simply a case for setting aside a fraudulent sale; and in doing this, the plaintiff, if he seeks equity, must do equity; and if he asks to get back his land, must pay the debt for which it is liable.

V. The petition shows no fraud, combination, or act, which entitles the plaintiff to any damages. Of course, the

mere fact that, according to the averments of petition, the notice of sale was not properly published, is no fraud; at most it can only affect our title, and that we can take care of. As to the other averments, they are:

1. That the defendant demanded gold. As this was before the legal tender act, and everybody else demanded gold, it is not clear what that has to do with the charge of fraudulent combination; and,

2. That the defendant proclaimed that the amount of the purchase money must be paid at once. As this is a very common proclamation at trustees' sales, especially where it is suspected that parties are bidding whose purpose is to postpone the sale by not complying with their purchase, it is not perceived that there is anything in this that is fraudulent.

HOLMES, Judge, delivered the opinion of the court.

The petition appears to be an action at law to recover damages. It is not framed as a bill for equitable relief, and contains no prayer for relief in equity. Most of the cases cited in support of it are cases in equity, and have no proper application to the points raised here on demurrer. The petition shows no cause of action at law. According to the allegations made in it, the sale by the trustee was not made in conformity with the power to sell which was given in the deed of trust, and was utterly void. (Stine v. Wilkerson, 10 Mo. 75.) The deed of trust being duly recorded was notice to all the world, and to this purchaser especially, and he was bound to see that the sale was made in pursuance of the power given, and in conformity with the trust declared. His deed is not merely voidable in equity, but void at law, upon the facts shown. The case of Dozier v. Jerman, (30 Mo. 216,) on which the plaintiff relies, contains nothing to the purpose here. That action was grounded upon a breach of contract, or a violation of an express agreement between the plaintiff and the defendant, for which damages were claimed. The party had agreed with the plaintiff, who was unable to pay the note when due, to give an extension of six

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months' time, but, in violation of his agreement, had directed the trustee to proceed and sell under the deed of trust; the sale was made in conformity with the trust and the power given therein, and, the other party being absent at the time, the property was sold at a sacrifice. There was no question but that the sale was entirely valid, and conveyed the property absolutely to the purchaser. The case is not at all in point here; and no case has been cited on behalf of the plaintiff that has any direct application to the questions raised on this demurrer.

The case of *Norman v. Hill* (2 Patt. & Heath, 676) was a bill in equity, and distinctly recognized the principles here laid down. It was a question of setting aside a deed for irregularity and unfairness in the sale; and it was held that the purchaser, having notice, takes the risk of any irregularity or unfairness in the sale, in a court of equity. Where there has been a complete execution of the power, and all essential conditions have been complied with, but there has been some irregularity, unfairness, fraud, or a mere breach of trust, there will doubtless be an adequate remedy in a court of equity, on a bill to set aside the sale and to have the deed declared void; and where the power has not been executed, or not in accordance with essential conditions, the sale and deed will be held to be utterly void, both at law and in equity. The suits at law which are referred to in that case appear to have been cases where there was some breach of trust only, and where the execution of the power to sell was such as to pass the legal title to the purchaser. So, also, in *Barksdale v. Finney*, (14 Gratt. 343,) which was a bill in equity. (8 White & Tud. Lead. Cas. in Eq., 498.)

Such is not the case here; and we know of no principle or authority on which a suit of this kind can be maintained for damages at law. We think the demurrer well taken.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.

JACOB E. GROVE, Plaintiff in Error, v. HEIRS OF ROBARDS
AND JAS. THOMPSON, Defendants in Error.

1. *Uses and Trusts—Purchasers.*—The trustee holds the legal estate for benefit of the *cestui qui trust*, and no act of his can prejudice the beneficiary ; but if the trustee be in actual possession of an estate and sell it to an innocent purchaser, for a valuable consideration, without any notice of the trust, the purchaser will be protected.
2. *Fraud—Notice—Conveyances.*—The heirs of the grantor in a deed of trust in the nature of a mortgage, who has by fraudulent representations induced the trustee to release the property without the knowledge and consent of the *cestui qui trust*, take the estate with full notice, and stand in the same position as their ancestor.

Error to Hannibal Court of Common Pleas.

Sharp & Broadhead, for plaintiff in error.

I. The power of the trustee over the legal estate or property vested in him exists only for the benefit of the *cestui qui trust*—2 Stor. Eq., § 977 ; 34 Mo. 518, *Ewing v. Shaf-ton*—where it is held that the person receiving satisfaction is the proper person to acknowledge satisfaction on the record.

II. The power vested in the trustee by the deed must be strictly pursued ; otherwise his acts are void—*Balridge, Adm'r, v. Walton*, 1 Mo. 520 ; *Stine v. Wilkson et als.*, 10 Mo. 75 ; 14 Mo. 341 ; *Butler v. Dunc.*, 1 P. Will. 454, in which last case the Lord Chancellor says : “ A declaration of trust is like prescribing a law to the trustee which is to be observed by him, and contains a prohibition to act to the contrary.”

Carr, for defendants in error.

When the trustee gave the deed of release to A. S. Robards, that divested him of all title, legal or equitable, to the lot in question. His power over it then became *functus officio*, and he had no authority to advertise and sell it afterwards. The sale under the deed of trust was void *ab initio*. The sale was not a mere irregularity. There was a total

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want of authority. Two remedies were open for the plaintiff in error to have pursued, viz. : either,

1. To sue the trustee for damages for improperly releasing the deed of trust ; or,

2. To have instituted a suit to set aside and vacate said deed of release, upon an allegation of fraud or collusion, and then get the court to restore the lien and order the property to be sold to satisfy the debt. The plaintiff in error has pursued neither of these remedies. When he alleged in his petition that the trustee had released the deed of trust and afterwards sold under it, he stated himself out of court.

WAGNER, Judge, delivered the opinion of the court.

The petition in this case is in the nature of a bill in equity. It states that on the 21st day of July, 1860, A. S. Robards, now deceased, and Amanda his wife, made, executed and delivered a deed of trust to Jas. Thompson, (who is made a co-defendant, (to secure the payment of a note due the plaintiff for the sum of \$1,120, which was payable six months after the date of said deed, by which he conveyed to defendant Thompson lot No. 7, in block No. 47, in the city of Hannibal, together with all the improvements thereon ; that in default of the payment of said note, when it became due and payable, the trustee Thompson was to advertise and sell the said lot for cash, after giving the notice specified in the said deed in some newspaper, and with the money arising from the sale he was to satisfy the expense of the trust and pay off and discharge the indebtedness that might be due on the note. The deed of trust was duly filed for record in the office of the recorder of Marion county, on the 8th day of September, 1860.

Robards, before his death, made a small payment on the note, and interest up to the 21st of March, 1861, but failed to pay the balance due. On the 30th day of April, 1861, Thompson, the trustee, at the request of, and through the representations of Robards, executed a deed of release to the

lot to the latter, leaving the debt still unpaid. Robards died insolvent. At the request of the plaintiff, Thompson, in accordance with the deed of trust, proceeded to advertise and sell the property, and plaintiff became the purchaser thereof at the sale on the 2d day of September, 1863, and received a deed for the same on the next day, which said deed was filed for record on the 5th day of October thereafter.

The petition charges that the release was procured by the false and fraudulent representations of the said grantor, A. S. Robards, and it also charges a combination and conspiracy with others to effect that object. It then prays that Amanda, the widow of A. S. Robards, who joined with her husband in executing the deed of trust, and relinquished her dower in the property therein conveyed, and who has, since the death of her said husband, instituted her action in the Hannibal Court of Common Pleas for assignment of dower in the said premises, be enjoined and restrained from further prosecuting her said suit, and also prays that the deed of release may be set aside and annulled.

The only material defence set up in the answer was that plaintiff had received a new note from Robards, and taken other security in satisfaction of the previous debt. But no evidence was introduced to sustain this allegation. The evidence at the trial showed that the release was obtained without the knowledge of the plaintiff, who was the *cestui qui trust*, and by the false and fraudulent representations of Robards, who induced the trustee to believe that the debt had been paid. The court, at the hearing of the cause, dismissed the bill, and it now comes here on writ of error.

It is now a well settled rule in equity that the trustee only holds the legal estate for the benefit of the *cestui qui trust*, and that no act of his shall prejudice the beneficiary. (Tif. & Bul. on Trusts and Trustees, 806-18; 1 Greenl. Cruise, 418.) Nor will the forbearance of a trustee in not doing what it was his duty to have done, affect the *cestui qui trust*, since, in that case, it might be in his power, by refusing to do his duty, to affect injuriously the rights of other persons.

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This rule, however, is subject to one exception—that is, where a trustee is in actual possession of an estate, and conveys it for a valuable consideration to an innocent purchaser who has no notice of the trust, such person will be entitled to hold the estate against the *cestui qui trust*—for an innocent person shall not in general have his title impeached. (Millard's case, 2 Freem. 43.) But if the alienee have notice of the trust, it attaches in his hands, and will be enforced in equity accordingly.

In this case, the heirs of Robards stand in no better position than Robards did himself in his life-time. The law implies that full notice was imparted to them. The release was a nullity; it was procured by a fraud, and was void in its very inception.

The law requires men to be honest and truthful in their representations, and every departure therefrom will be treated as fraudulent.

The judgment is reversed and the cause remanded. The other judges concur.

 ISAAC W. MITCHELL, Appellant, v. AUGUSTUS P. LADEW *et als.*, Respondents.

1. *Mortgage—Deed of Trust—Installments.*—Where a deed of trust in the nature of a mortgage, securing several notes maturing at different dates, provided, that, in default of payment of said notes or either of them, or of any one of them, or the interest thereon, as they become due and payable, the trustee, might sell, &c.; upon a bill to foreclose the equity of redemption, &c., after all the notes fell due: *Held*, that the notes were to be paid and satisfied in the order in which they matured. The mere failure or neglect to pursue the remedy until all the notes become due cannot impair the rights of the parties where they have done no act which can act injuriously upon the other party.
2. *Mortgage—Deed of Trust—Debt.*—The debt being the principal thing, in a mortgage or deed of trust given to secure it, the transfer of the debt carries with it the security.

Appeal from St. Louis Court of Common Pleas.

Lackland, Cline & Jamison, for appellant.

In a case where several notes falling due at different times

36	526
44a	329
36	526
48a	77
36	526
54a	12
36	526
124	582
36	526
127	285
36	526
69a	91
36	526
672a	242
36	526
76a	65
77a	555

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are held by different persons, and are secured by a deed of trust or mortgage, the question is how are the proceeds of the property conveyed or mortgaged to be disposed of where they are not sufficient to pay all the notes. The following cases seem to decide that the proceeds must be disposed of in the payment of the notes as they fall due; that the note or notes first falling due must be paid first, and have priority over those falling due subsequently, unless there is something in the contract, or to be inferred from the dealings between the parties, showing their intention to be otherwise, to-wit: Gwathmeys v. Ragland, 1 Rand. 466; U. S. Bank v. Covert, 13 Oh. 240; Woods v. Trask, 7 Wis. 566; Stanley v. Beatty, 4 Ind. 134; Larrabee v. Lumbert, 32 Me. 97; State Bk. v. Tweedy, 8 Blackf. 447; Hinds v. Mooers, 11 Iow. 211; Grapegethery v. Fesservary; 9 Iow. 163; Rankin v. Majors, 9 Iow. 297; Cullen v. Erwin, 4 Alx. 452.

The following cases decide the other way—that there is no such priority, but the proceeds must be disposed of to pay all the notes *pro rata*, unless it is otherwise agreed, &c.: Waterman v. Hunt, 2 R. I. 298; John v. Candage, 31 Me. 23; Bk. of England v. Tarlton, 23 Miss. (1 Cush.) 173; Lewis v. De Forrest, 20 Conn. 427; Donley et al. v. Hays, 17 Serg. & R. 400; Perry's App., 22 Penn. S. R. 43; Hancock's App., 34 Penn. S. R. 155; Cooper v. Ulman, Mich. Walk. Ch. 251; Pugh v. Holt, 27 Miss. (5 Cush.) 461; Righter v. State, 3 Sandf. Ch. 608; Carpenter v. Carpenter, 1 Vern. Ch. 440; Braithwait v. Braithwait, 1 Vern. Ch. 334; Bois v. Marsh (folio ed.) 2 Ch. (8 vols. in 1) s. p. 155; Blower v. Merritt, 2 Ves. 420; Clark v. Sewell, 3 Atk. 100; Brown v. Allen, 1 Vern. Ch. 31; Eure v. Eure, case 15, 1 Eq. Cs. 115.

The English cases above referred to will be found cited by the court in the case of Donley et al. v. Hays, 17 Serg. & R. 400; the fact, however, is that no English case has been found by us bearing directly on the point.

The above cited English cases were decisions construing wills, marriage settlements, &c., where preference was claimed by a portion of the beneficiaries. Thus when a tes-

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tator died leaving a will by which he devised legacies as follows: 1st, to his son John, £100; 2d, to his son George, £100, and so on, and there was not sufficient property left by the testator to pay all the legacies; in such cases, the English courts universally have decided that the legacies must be paid *pro rata*; that the first legatee has no right to have the whole of his legacy paid and satisfied to the exclusion of the other legatees: which seems to assert a principle of justice and equity applicable to the point upon which the American cases bear.

Whittelsey, for respondents.

The main question in this case is, by what rule shall the proceeds of sale of property conveyed by mortgage or deed of trust, given to secure payment of notes maturing at different dates, be applied in payment? The respondents claim, there being no particular equities to modify the general rule, that,

I. Where a mortgage or deed of trust is given to secure notes maturing at different dates, that the notes are to be paid from the proceeds of sale in the order of their maturity: the note first due should be first paid—*qui prior est in tempore potior est in jure*. This rule seems most reasonable, and is analagous to the case of successive conveyances of lands subject to one encumbrance. To satisfy the encumbrance, the parcel last conveyed must be first sold, and so on, in the reverse order of conveyances (*Aldrich v. Cooper*, 2 Wh. & Tud. L. C. Eq., Pt. I., 171); or rather it is like the case of successive mortgages, in which there is no contribution.

This rule is adopted in most of the States; *State Bk. v. Tweedy*, 8 Blackf., Ind. 447. This is a well considered case, and has been followed by *Stanley v. Beatty*, 4 Ind. 434; *Hough v. Osborne*, 7 Ind. 140. In Virginia, *Gwathmeys v. Ragland*, 1 Rand. 466. In Alabama, *McVay v. Bloodgood*, 9 Port. 547; *Bank of Mobile v. Planters' Bank*, 9 Ala. 645; *Cullum v. Erwin*, 4 Ala. 452. In Ohio, *Bk. of U. S. v. Court*, 13 Ohio, 240. In Iowa, *Grapegeth v. Fesservary*, 9 Iow.

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163; Rankin v. Majors, 9 Iow. 297; Hinds v. Mooers, 11 Io. 211; Larrabee v. Lumbert, 32 Me. 97. In New Hampshire, Hunt v. Stiles, 10 N. H. 466. In Wisconsin, Wood & Trask, 7 Wis. 566; Harrison v. Roberts, 6 Flor. 171.

Some of the States, following the rule in Donley v. Hays, 17 Serg. & R. 400, apportion the proceeds of sale *pro rata* to each note secured by the same mortgage; but, in that case, Ch. J. Gibson dissented, and the Indiana court declared that his opinion was better sustained by principle and reason.

II. The transfer of the debt carried the security with it without regard to the mere possession of the deed of trust or mortgage, or any assignment thereof. (Lagrange v. Chauvin, 2 Mo. 179; Crinnion v. Nelson, 7 Mo. 466; Thayer v. Campbell, 9 Mo. 277; Anderson v. Baumgartner, 27 Mo. 80; Roe v. Dawson, 2 Wh. & Tud. L. C., Pt. 2, p. 236 & 449.)

WAGNER, Judge, delivered the opinion of the court.

The plaintiff filed his petition in the St. Louis Court of Common Pleas to foreclose a deed of trust made by A. P. Ladew to John G. Priest and George Knapp, as trustees to secure the payment of three negotiable promissory notes made by said Ladew to John J. Anderson, which were given for the purchase of property situated in St. Louis county; said notes were dated May 5, 1858, for the sum of four thousand five hundred and sixty-six dollars and sixty-six cents each, payable in one, two and three years, with interest at six per cent per annum from date. The petition alleges that Ladew paid the first note; that said Anderson endorsed the said second and third notes to John J. Anderson & Co., who endorsed them to one John C. Page, who endorsed them to plaintiff; that the second note was not paid at maturity, and that after protest and notice John J. Anderson took it up and paid plaintiff the amount due thereon, and alleges that said George Knapp claims to be the holder of said note and to have it paid in full or in part out of the trust property.

The petition then further states that the third note was duly protested, and was held by the plaintiff, and was still

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unpaid, and that the property conveyed in said deed of trust would not, upon sale, pay both notes; and that George Knapp, being holder of one of the notes, could not act as trustee in making a sale, and that no provision was made for a sale by J. G. Priest alone. It then prays that the equity of redemption be foreclosed, the lands sold, and that from the proceeds of sale, after payment of costs, the note held by plaintiff be paid in full.

Ladew, the maker of the notes and deed of trust, in his answer, denies all knowledge of any endorsement of the notes to Page or plaintiff, admits that the notes payable at two and three years are still due and unpaid, alleges that the note due at two years was transferred by John J. Anderson to George Knapp & Co. before the maturity of the third note, and prays that the second note be first paid from the proceeds of sale.

The answer of George Knapp & Co. admits the payment of the note at one year, and also that Jno. J. Anderson upon protest of the second note took it up, but alleges that plaintiff had endorsed the same to one A. A. Howell, who was the legal owner thereof at maturity. They allege that said Anderson assigned to them said two years note, before the maturity of the note at three years, in payment of and as security for his indebtedness to them; and allege, also, that they were purchasers of the note for a valuable consideration and without any notice of any equities existing against it, and that they took the said note upon the faith that it was secured by deed of trust and was to be first paid upon sale under said deed; that Geo. Knapp had never accepted the trust, and had executed a disclaimer and quit-claim to said Priest. They claim priority of payment under the deed.

At the trial before the court, the court found both notes due, and decreed a foreclosure and sale; and that the money arising therefrom, after paying the expenses and costs, should be applied to the payment of the note due at two years first.

There is but a single question that arises in the determin-

ation of this case, and that is, whether, when a deed of trust or mortgage is made to secure the payment of promissory notes falling due in instalments or at different dates, and the property on which the security is taken is not sold till the maturity of all the notes, and is not sufficient to pay them all, the proceeds shall be applied to the payment of the notes, first, in the order in which they become due, or to all *pro rata*.

We have not been able to find any adjudication of this question in this court; it has often been raised and passed upon in the courts of several of our sister States, and opposite conclusions have been arrived at.

The cases adhering to the doctrine that the application of the funds should be made *pro rata*, irrespective of the time when the notes become due, have all been decided on the authority of *Donley v. Hays*, 17 Serg. & R. 400. It was then held by the Supreme Court of Pennsylvania, that where a mortgage is given to secure a debt, which debt is evidenced by bonds payable at various periods, and the holder of the bonds assigned some of them to different persons at different times, and retained the balance himself; and the fund arising from the sale of the mortgaged premises, by execution against the mortgagor, falls short of the whole mortgage debt, the respective assignees and the mortgagee are entitled to a *pro rata* dividend of the proceeds according to the amounts of their bonds by them held. The court based its decision principally upon several old English Chancery decisions which arose out of settlement cases, and where the funds proving insufficient the chancellors had ordered contribution to be made. With all deference for that learned and intelligent tribunal, we are unable to perceive that they have really any particular bearing on the subject. Ch. J. Gibson delivered a most able dissenting opinion, and his position seems to be the best sustained by authority and reason. It is admitted by this class of cases that priority may be given in the payment of the notes first falling due, when it appears that such was the intention of the parties; but in the absence of any

such intention manifested by some act, the law will appropriate the payments alike to all in proportion to their respective amounts, without regard to the time they fall due. But the weight of authority, we think, is decidedly in favor of the rule, as it has been declared that "different debts, secured by the same mortgage, are to be paid from the mortgage fund in the order in which they fall due." (Hunt v. Stiles, 10 N. H. 466; Wilson v. Hayward, 6 Flor. 171; U. S. Bank v. Covert, 13 Oh. 240; Woods v. Trask, 7 Wis. 566; Larrabee v. Lumbert, 82 Me. 97; State Bk. v. Tweedy, 8 Blackf. 447; Hinds v. Mooers, 11 Iow. 211.)

The case of Gwathmeys v. Ragland, 1 Rand. 466, which was decided by the Virginia Court of Appeals in 1823, is precisely in point, and may be regarded as a leading case on the subject. There a deed of trust was executed by William and Francis Sutton to trustees, to secure the payment of three notes to a certain Anderson Barret. The first note was paid; the second was transferred by endorsement to Nathaniel Ragland without any assignment to him of the deed of trust; the third note was endorsed to Robert and Temple Gwathmey, who took an assignment of the deed of trust for their security. The trustees having advertised the land for sale to satisfy Ragland's claim, the Gwathmeys filed a bill in the superior Court of Chancery of Richmond, against Ragland and the trustees, to enjoin them from selling the trust property to satisfy Ragland's claim; alleging that, as they had taken an assignment of the deed of trust and he had not, they were entitled to a preference over him, in satisfaction of their claim, out of the trust property. The injunction was granted. Ragland answered that he was induced to take an assignment of the note in question by the equitable right which he acquired thereby to the deed of trust, without which he would not have taken said note. On motion of Ragland, the injunction was dissolved. The Court of Appeals affirmed the judgment dissolving the injunction, and held that the deed of trust from the Suttons was intended by the parties to it as

additional security for the payment of the notes to Barret, or his assigns, in the order in which they fell due.

The debt being the principal thing, a mortgage or deed of trust to secure it is merely an accessory or incident, and the transfer of the debt carries with it the equitable right to the trust property. *Omne principale trahit ad se accessorium*. And where there are several notes so secured, and they are assigned to different persons, each assignee takes an equitable interest in the property *pro tanto*. This right may be defeated by intervening equities, as by the negligence of the assignee, or where, by his improper conduct or misrepresentations, innocent purchasers have been induced to acquire interests in the trust property. (*Anderson v. Baumgartner*, 27 Mo. 80.)

The question now is, how is the trust fund to be applied in payment of notes falling due at different times? From the authorities, this is entirely open for our consideration and decision. Under our law of mortgages, where a mortgage creditor has several notes against the mortgagee, he may proceed to foreclose and sell the mortgaged premises when the first note becomes due, and the sale will convey a good title though it only pays the first note. (*Buford v. Smith*, 7 Mo. 489.)

The deed of trust, in this case, provides that in default of payment of said notes or either of them, or any part of either of them, or the interest thereon, as they respectively become due and payable, the trustees shall proceed to sell, &c. The most reasonable interpretation of the contract is, that the notes were to be paid off and satisfied in the order in which they fell due. It is indisputable that when the first note became due, if it had not been paid, the trustees might have sold the property and applied all the proceeds to satisfy it, had there not been more than sufficient arising out of the sale for that purpose; so, when the second note became due and payable, a like sale might have been had, and the money arising therefrom been wholly absorbed in its application to the payment of the said note before the third fell due. The

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mere failure or neglect to pursue the remedy till all the notes are due cannot impair or alter the rights of the parties here, where they have done no act that can operate injuriously to the other party.

Notes of this description, secured by mortgages and deeds of trust, enter largely into the business transactions of the country, and parties taking and receiving them do so invariably with the understanding that they will be paid in the order in which they become due. With those who are postponed, it is simply a matter where they have resorted to security, and the security was proven to be insufficient. Had all the notes been due and payable upon default made in the payment of the first, as is frequently provided in the making of these contracts, the case might be materially changed.

Judgment affirmed. Judge Holmes concurs; Judge Lovelace absent.

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52 490
36 534
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JOHN C. IVORY, Appellant, v. JOSEPH MURPHY, Respondent.

1. *Statute of Frauds—Writing.*—A memorandum or note in writing, to take a case out of the statute of frauds, signed by the party to be charged, need not express the consideration, and need not be signed by the party seeking to enforce the contract. Where a bill is filed to enforce the specific performance of a contract in writing signed by the defendant, the contract is also signed by the plaintiff.
2. *Contract—Specific Performance.*—The specific performance of a contract for the sale of land, is not granted as a mere matter of right by the court to which it is addressed, but from a just and reasonable discretion, to be governed by sound legal rules and principles.

Appeal from St. Louis Land Court.

Glover & Shepley, for appellant.

I. The agreement being signed by Murphy alone is sufficient to charge him; for,

1. The express words of the statute are that it need only be signed by the *party to be charged*. (R. C. 1855, p. 807.)
2. Such has been the almost uniform decision as to the

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true construction of the statute. (*Clason v. Bailey*, 14 Johns. 484; *Matter of Hunter*, 1 Ed., Ch. 1; *McCrea v. Purvent*, 16 Wend. 460; *Woodward v. Harris*, 3 Sand. 272; *Penneman v. Hartshorn*, 13 Mass. 87; *Old Colony R R. Co. v. Evans*, 6 Gray, 25; *Flight v. Bolland*, 4 Russ. 298; *Brown*, Stat. Frauds, §§ 365-6; *Bean et als. v. Vallé*, 2 Mo. 126; *Halsa v. Halsa*, 8 Mo. 803; *King v. Wood*, 7 Mo. 389; *Beau v. Burbank*, 16 Maine, 458.)

8. The plaintiff, by bringing his action, is estopped from denying that he has signed the agreement. (Same cases already cited.)

4. Bills of specific performance upon agreements signed by one party are maintained, not only because the language of the statute admits of no other construction, but because plaintiff, by filing his bill, makes the remedy mutual. (*Palmer v. Scott*, 1 Russ. & Ing. 391; *Martin v. Mitchell*, 2 Jac. & Walk. 426; *Worrall v. Mann*, 1 Seld. 229; *Sugden, Vendors*, 112-13; *Sherley v. Sherley*, 7 Blackf. 452.)

II. The property concerning the purchase of which the agreement was made is sufficiently described.

III. The consideration was accurately and specifically stated. The principal case, that of *Wain v. Walters*, has been held not to be law in more than half the States of the Union, including Missouri. (*Brown*, Stat. Frauds, § 391.) But it is not necessary in this case to seek to overturn that decision, for it in no manner supports the position taken by defendant. That case, as well as all others, holds the position that the essential terms of the contract must be expressed in the writing; and it has been held over and over again, that this may appear from implication of the words used in the writing. Chief Justice Tindall, 1 Bing. N. C., 761, cited in sec. 399 of *Brown on Statute of Frauds*, as containing the true doctrine.

G. P. Strong, for respondent.

I. Defendant relies upon the Statute of Frauds, which provides that "no action shall be brought upon any contract

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for the sale of lands," &c., "unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith." (R. C. 1855, p. 807, § 5.) Hence it follows necessarily, that the *agreement* to be enforced must be a valid agreement; that is, it must be between parties competent to contract—must be upon a sufficient consideration. It must be concerning a proper subject matter, and then must be clear as to what the parties respectively undertake to do. In the absence of any of these qualities, there can be no valid agreement that any court of justice would undertake to enforce. (Wain v. Walters, 5 East. 16.) Now, a *consideration* is of the very essence of a contract; and, with or without the statute of frauds, no contract wanting this element can be enforced. (Saunders v. Wakefield, 4 Barn. & Ald. 595.) This would be a *nudum pactum*, and nothing more, and no court would enforce it. (Wain v. Walters, 5 East. 16; Morley v. Boothby, 3 Bing. 107.) It is fatally defective, because it does not state that Ivory had promised to sell. (Bean v. Burbank, 16 Mo., 4 Shep., 458; 3 T. R., Durnf. & East., 653.) It is not a contract for the sale of lands, because there is no engagement on Ivory's part to sell lands, and there can be no obligation to buy lands without a corresponding obligation to sell lands. There must be a binding contract to sell lands before there can be any contract to buy lands. (First Baptist Church v. Bigelow, 16 Wend. 28; Geiger v. Green, 4 Gill. 476.) This distinction between executory and executed contracts was noticed and relied upon by Ch. Justice McGirk, in giving his opinion in the case of Bean et al. v. Vallé et als., 2 Mo. 126; King v. Wood, 7 Mo. 389; Edgerton v. Matthews, 6 East. 307; Soles v. Hickman, 20 Penn. 180–183; First Baptist Church v. Bigelow, 16 Wend. 28; Sears v. Brink, 3 J. R. 210; Underwood v. Campbell, 14 N. Hamp. 393; Brown, Stat. Frauds, p. 405, §§ 394, 401; Sugden, Vend. 103; Lee v. Whitcomb, 5 Bing. 87. A contract to sell lands where there is no agreement to purchase, is void.

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(Bean v. Burbank, 4 Shep. 458; Soles v. Hickman, 20 Pa. 183.) The case of Sears v. Brink et al., 3 J. R. 210, is precisely in point. Underwood v. Campbell, 14 N. Hamp. 393, is to the same effect. The whole question is presented in Brown on Statute of Frauds, p. 405, § 394, with the reasoning upon which the case of Wain v. Walters is sustained upon sound principles applicable to the construction of statutes.

II. It is a well established principle of equity jurisprudence, that a decree for specific performance is not a matter of right. (2 Sto. Eq. §§ 767, 770; Waters v. Howard, 8 Gill. 262, 283; Owings v. Baldwin, *id.* 337; Duvall v. Myers, 2 Md. Ch. 401-404; Geiger v. Green, 4 Gill. 477; Dodd v. Seymour, 21 Conn. 476.)

Although the language of the agreement is, "I have purchased," the petition shows that it was only understood to be an "agreement to purchase," not an actual purchase. Such is the legal construction of the words. Words indicating a conveyance *in presenti* are always construed to be a mere agreement to convey, where such is the evident intent of the parties. (Jackson v. Moncrief, 5 Wend. 26; Ives v. Ives, 13 J. R. 388; Jackson v. Myers, 3 *id.* 388; Jackson v. Clark, *id.* 424; Atwood v. Cobb, 16 Pick. 227.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff commenced his suit for specific performance, in the Land Court of St. Louis county, on the following instrument:

"St. Louis, May 17, 1859. I have this day purchased of John C. Ivory, for the sum of \$25,000, the land in the Carondelet common field, known as blocks 61, 62 and 63, in survey numbered one hundred, and the western one-half of survey No. 98 of said common fields, and being known as a 30 and a 20 arpent tract; \$6,000 to be cash, and the balance to be divided into eight payments, first at 3½ months, and the remaining seven every six months thereafter, and bearing 6 per cent. per annum interest; but if said Ivory

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elects, a deed of trust on a part of this property must be assumed, and the balance made in payments as above. Deeds and papers to be made out as soon as possible. Joseph Murphy."

At the hearing of the cause in the Land Court, the plaintiff introduced the above writing in evidence, and then closed his case; whereupon the court, at the instance of the defendant, declared the law to be that, upon all the evidence in the cause, the plaintiff was not entitled to a decree for specific performance of the alleged contract. Plaintiff then took a non-suit, with leave to move to set the same aside. For the purpose of bringing the case to this court, it was admitted that plaintiff had title in the premises, and that he had tendered to the defendant a good and sufficient deed of conveyance to the same prior to the institution of this suit; and the only question involved in the determination here is, the legal effect and validity of the written instrument sued on.

It is insisted by the defendant that the contract is void for want of consideration; that the written instrument is not such an agreement or memorandum as is required by the statute of frauds; and that plaintiff, not having contracted or agreed to sell the lands to defendant, it is not binding on him for want of mutuality. By the Statute of Frauds and Perjuries, it is enacted that no action shall be brought to charge any person upon any contract for the sale of lands, tenements, hereditaments, or any interest in or concerning them, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person by him thereto lawfully authorized. It is not necessary that the agreement should be signed by both parties, but only by the party to be charged. In the construction of the statute, courts have widely differed as to the meaning to be attached to the words memorandum or agreement, and the most protracted discussion has arisen out of this difference. Now, the statute was meant to prevent per-

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juries, and hence it is contended that the writing or agreement must be complete in itself, containing the terms, the parties and the consideration, so that it can be enforced in the courts without the application of parol testimony.

In *Wain v. Walters* (5 East. 10), decided by Lord Ellenborough, it was held the word agreement must be understood to mean the consideration for the promise, as well as the promise itself, and, therefore, where one promised in writing that parol evidence of the consideration was inadmissible by the statute, and that, consequently, such promise appearing to be without consideration upon the face of the written agreement, was *nudum pactum*, and gave no cause of action. The decisions in the English courts have at times departed greatly from the strict doctrines laid down in *Wain v. Walters*, but that authority has been followed and declared to be law in many of the States in this Union, whilst in others it is rejected. From a review of the authorities, it will be seen that it has never met the approbation of the courts in this State.

The first case in which this subject was brought up for consideration in this court, is *Bean et al. v. Vallé et al.* (2 Mo. 126), from which it appears that on the 3d day of July, 1824, Bean obtained from the Receiver of Public Money for the St. Louis Land District, a receipt in these words:

"Receiver's Office, St. Louis, 3d July, 1824.—Received of Jonathan L. Bean, of St. Louis city, Mo., the sum of one hundred dollars, being in full, W. half S.W. qr. of section No. 4, township No. 38, N. range 5 east, containing eighty acres, at the rate of \$1.25 per acre. (Signed,) G. F. Strother, Receiver."

Bean, through an agent, sold the land to Vallé and others, and delivered the receipt of the Receiver, with the following endorsement thereon: "Transferred to Vallé, Janis and Vallé," and signed "J. L. Bean"; and this was all the evidence, note or memorandum there was of the contract of sale. Upon a bill brought for specific performance by Vallé, Janis and Vallé, the defence pleaded was that the endorse-

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ment on the back of the Receiver's certificate did not show what land was transferred, nor how much, nor for how much; that the Statute of Frauds covered the case, and therefore no specific performance would be decreed. But McGirk, C. J., delivering the opinion of the court, held the transfer sufficiently certain as to the thing sold, and certain as to the quantity of interest sold, and declared that a "note or memorandum is something less than the main subject in detail, and if the note only says: 'Witness, that A. agrees to sell to B. a piece of land in fee,' and A. should sign this, I hold the statute is satisfied as to A.; but if B. refuses to take the land, then A. must show on a suit for specific performance such note signed by B. In my opinion, this is all the statute requires, and the vendor and vendee must each look to his own part of the transaction in case of future difficulty."

In *Halsa v. Halsa* (8 Mo. 303), the father, who resided in Chariton county, promised his son, who was then living in Livingston county, that if he would remove to a piece of land belonging to and near the residence of the former, he would give the land to his son. The son, at the time of the promise, had a family, and accepted the offer and removed to the land, and his father assigned to him the certificate of entry, in these words: "I, Joseph Halsa, do *sine* the within certificate over to Amos Halsa, which is to empower him to lift the deed in his own name. April 18th, 1835. Joseph Halsa." The officers of the Land Office refused to give the patent for the land to the son, upon his claim under this assignment, and delivered it to the father; the son then applied for a deed, and upon the father declining to make a conveyance vesting the title in him, he brought his bill for specific performance. It was decided by this court that the assignment on the certificate was a sufficient note or memorandum to take the transaction out of the operation of the Statute of Frauds, and that the law had long been settled in this State by the case of *Bean et al. v. Vallé et al.* And Judge Scott says: "If the consideration was valuable, it

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may be objected it was necessary to express it in the assignment of the certificate, and, not being so expressed, the agreement was not binding under the Statute of Frauds. This was the law as declared in England, in the case of *Wain v. Walters* (5 East.); but in the case before referred to of *Bean et al. v. Vallé et al.*, this question underwent an elaborate argument, and this court came to the conclusion that a correct construction of the Statute of Frauds did not require that the consideration should be expressed in the note, memorandum, or agreement, concerning a sale or transfer of lands or an interest therein."

The case of *King v. Wood* (7 Mo. 389) does not militate against the construction of the statute enunciated in the foregoing cases. There, the proposition which was made and accepted was to sell the property known as the "Union Hotel property." The essential terms of the description were fatally defective; there was nothing on which the contract could operate without resorting to parol evidence to fix its locality and the precise property intended to be sold. Were the question *res nova*, we are not prepared to say that we would give to the statute so liberal a construction as it has heretofore received in this court; but we feel bound by the doctrine of *stare decisis* to adhere to the rule which has been uniform ever since the establishment of our State Government.

The case that we are now considering is much stronger and more definite than either of those we have just cited. In the agreement, the property is described with sufficient accuracy, the amount to be paid, and the manner and time of making the payments also appear; and there is but one objection that can be urged against it, according to the most stringent principles laid down in *Wain v. Walters*, and the authorities that have followed that case, and that is, that it does not appear by the note, memorandum or agreement that the vendor is bound, and there is consequently no mutuality. It was decided by Lord Redesdale, in *Lawrence-son v. Butler*, (1 Sch. & Lef. 20,) that unless the agree-

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ment was signed by both parties, there was a want of mutuality, which, upon established principles, is an objection to specific performance. But this decision was received with dissatisfaction, and has been long since considered as overruled, both in this country and in England.

Where the party files a bill, he does an act that will bind him, and from that time there is mutuality; and the other party cannot plead the Statute of Frauds, because the words of that statute only prevent an action from being brought where the agreement is not signed by the party to be charged, or by some person by him thereto lawfully authorized. When the bill is filed, it is an attempt to charge the defendant, and, if he has signed the agreement, it is signed by the party to be charged, and it follows that he cannot take advantage of the statute. (*Martin v. Mitchell*, 2 Jacob & Walk. 413; *Flight v. Bolland*, 4 Russ. 298; *Palmer v. Scott*, 1 Russ. & Myl. 391; *McGowen v. West*, 7 Mo. 569, affirmed in *Farrar v. Patton*, 20 Mo. 81.) Where there is merely a proposition, it must, to constitute a valid agreement, be accepted in writing; but when the party signs the agreement, it then becomes, on his part, an express undertaking.

As to the effect which the interlineation may have on the written agreement, we cannot now give an opinion; that matter is not properly before us. There is nothing saved in the record which will enable us to pass upon it. A bill for the specific performance of a contract is not granted as a matter of right by the court to which it is addressed, but from a just and reasonable discretion. But this discretion is not to be exercised in an arbitrary or capricious manner, but is to be governed by sound legal rules and principles. If, upon a whole view of the facts and circumstances, the court shall be of the opinion that the contract is fair, just and equitable, it will use its extraordinary authority and decree specific performance; but if, on the contrary, it appears inequitable and unjust, the remedy will be denied and the party left to his action at law.

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The court, from its instruction, evidently considered the agreement bad under the Statute of Frauds, and for this we reverse the judgment and remand the cause.

Reversed and remanded. Judge Holmes concurs; Judge Lovelace absent.

LEVIN H. BAKER, ADM'R OF PETER LINDELL, Respondent, v.
THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Ap-
pellant.

1. *Constitution—Eminent Domain—Action.*—Where the charter of a railroad corporation gives to the company authority to enter upon lands near the line of the road, and to take therefrom materials to be used in its construction, and provides for ascertaining the damages at the instance of either party, the common law remedy is superseded by the statute, and the party injured cannot sue the corporation at law. (*Soulard v. City of St. Louis*, *post*, p. 546.) Where either party may be the actor, neither can complain that the other did not begin.
2. *Trespasses—Action.*—The "Act concerning trespasses" (R. C. 1855, p. 1532) contemplates voluntary or wilful trespasses only, which are done without lawful right.
3. *Practice—Jurisdiction.*—Objections to the jurisdiction of the court are not waived by omitting to take advantage of them by demurrer or answer, and the exception may be taken on the motion for a new trial.

Appeal from Marion Circuit Court.

Carr, for appellant.

Lipscomb, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This was an action of trespass under the "Act concerning trespasses," (R. C. 1855, p. 1552,) for cutting down trees on the plaintiff's land. At first the defendant pleaded not guilty, and gave notice of a special defence, founded on the "Act to incorporate the Hannibal and St. Joseph Railroad Company," approved Feb. 16, 1847, which gave the company power to take wood from lands adjoining the railroad for purposes of construction. Afterwards this answer was with-

36	548
40a	120
56	548
120	118
36	548
125	480
36	548
149	258
36	548
175	85
176	1717

drawn, and judgment by default allowed to be taken against the defendant, upon an agreement for single damages only, and an inquiry was ordered. Upon the inquiry of damages, evidence was introduced by the plaintiff tending to show the number and value of the trees cut, and that they had been cut by authority of the defendant, and had been used for ties in the construction of the railroad, and the jury assessed the damages at \$1,080.88. Previous to this assessment of damages, a motion had been made, supported by affidavit, to set aside the default, for the reason, among others, that the court had no jurisdiction of the subject matter of the action; and after the inquiry a motion for a new trial was filed, grounded in part upon the same objection. The evidence offered by the plaintiff, as well as by the affidavit, very clearly showed that the trees had been cut by authority of the defendant to be used in the construction of the railroad; and on the motion for a new trial, it was insisted on the part of the defendant that the same statute which gave the power to take trees for that purpose, also provided a mode of compensation, which was an exclusive remedy for the injury complained of.

The act of Feb. 23, 1853, amending "An act to incorporate the Hannibal and St. Joseph Railroad Company," (R.R. Laws, p. 15,) gave the company "power by themselves or agents to enter and take from any land in the neighborhood of the line of their railroad, earth, gravel, stone, wood, or other materials, necessary for the construction and operation of said road"; and it provided a specific mode of proceeding by which the damages should be ascertained, at the instance of either party, by three impartial and disinterested householders, to be appointed by any justice of the peace, with an appeal to the county court. Under this act, the defendant had lawful power to do all that was proved to have been done, and an ample and convenient remedy was provided for making compensation for any injury that the plaintiff had sustained. It is well settled that when the Legislature authorizes an act of this kind, the necessary and natural con-

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sequence of which is that some damage will be done to the property of another, the party who does the act cannot be complained of as a wrongdoer. The common law remedy is superseded by the statute, and the person injured must pursue the course pointed out by the act. The statute remedy is not merely cumulative upon the common law action, but an entire substitution for it, and must be exclusively pursued; and where either party, as in this case, may be the actor, neither can complain that the other did not first begin. (Stowell v. Flagg, 11 Man. 363; Stevens v. Pre. of Middlesex, 12 Mass. 482; Aldrich v. Cheshire R.R. Co., 1 Fos., N. H. 359; Calkin v. Baldwin, 4 Wend. 667; Null v. Whitewater Valley Canal Co., 4 Ind. 431; Kimble v. same, 1 Ind. 285.)

The statute proceeding is a simple mode of ascertaining the amount of damages which is to be paid to the injured party by way of compensation for private property taken for public use, under the law, and it is not to be considered as an assessment of damages as for a wrongful trespass. The "Act concerning trespasses" contemplates voluntary or wilful trespasses only, which are done without lawful right, and it inflicts penalties upon the defendant as a wrongdoer. In this case there was no trespass and no wrongdoer, and this act had no application.

This court having no jurisdiction of the subject of the action, none could be given by any consent or agreement of the parties. An objection to the jurisdiction of the court is not waived by omitting to take advantage of it on demurrer or by answer, and the exception may be taken on motion, after judgment. (R. C. 1855, p. 1231, § 10; Valerine v. Thompson, 3 Seld. 576.) The want of jurisdiction was made sufficiently to appear, and the motion for a new trial should have been granted. As the whole case is disposed of on this ground alone, it will be unnecessary to notice the other points which have been made.

Judgment reversed and the cause remanded. The other judges concur.

**JAMES G. SOULARD, Plaintiff in Error, v. THE CITY OF
ST. LOUIS, Defendant in Error.**

1. *Constitution—Action.—Eminent Domain.*—Where the Legislature authorizes property to be taken for public uses, and at the same time provides how the damages for such taking may be assessed at the election of either party, and redress obtained, the common law remedy will be taken to be superseded; but where no such remedy is given at the election of the party complaining of the injury, the common law right of action remains unaltered. (See *Lindell's Adm'r v. Hann. & St. Jo. RR. Co.*, ante, p. 543.)
2. *Constitution—Eminent Domain—Corporations, Municipal and Private.*—There is a well recognized distinction as to liability between the acts of a municipal corporation in the discharge of such legislative functions as have been delegated to it by the State, and those acts done by a mere private corporation in the prosecution of enterprises for its own advantage or benefit. In the former case, no action can be maintained holding it responsible, where it is pursuing in a legal manner the power thus delegated to it.
3. *Corporations—Damages—Action.*—A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done at its command, by its agents, in relation to a matter within the scope of the purpose for which it was incorporated. Where a municipal corporation opened a street through the lands of an individual without first having the land condemned and damages assessed in the manner provided by its charter, in an action against such corporation for the damages sustained the value of the land taken will be the measure of damages, and a judgment for such damages will work a dedication of the land to the corporation.

Error to St. Louis Court of Common Pleas.

The plaintiff filed the following petition:

“The plaintiff states that, for more than ten years before the year 1855, he and his brothers Henry G. Soulard and Benjamin A. Soulard were proprietors in fee as tenants in common of a certain tract of land in the city of St. Louis, being the eastern part of the United States survey for James Mackay, and embracing the land in said survey taken and appropriated by the defendant for public use as Jackson street, as hereinafter stated. In the month of September, 1855, said Henry G. and Benjamin A. sold and conveyed to said plaintiff their estate and interest in said tract, and thereby the plaintiff became sole proprietor thereof in fee.

“The plaintiff further states that, in the year 1854, the

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defendant, without any notice to the lawful proprietors of said tract, and without making or offering to them any compensation, and without their consent, did open and use a portion of said tract, in quantity about one acre and a half, as a public street of said city, by the name of Jackson street, and have ever since used the same as a public street to the present time.

“The plaintiff further states that the defendant, by the ordinance of its common council, has established said Jackson street, embracing the portion of said tract opened and used as aforesaid, as a public street of said city; and the plaintiff, within the present year, has signified to the defendant his assent to such opening and use of said street on the terms of the defendant's paying to the plaintiff the first value of his land and the improvements thereon taken for such purpose.

“The plaintiff further states that the just and fair value of the portion of said tract taken and used for said street as aforesaid, together with the buildings and improvements thereon, was and is the sum of eight thousand dollars; but no part of said sum has ever been paid to the plaintiff, or any other lawful proprietor of said land, buildings and improvements.

“For the further assurance of his claim and demand in this action, the plaintiff has obtained from said Henry G. and Benjamin A. Soulard a transfer and assignment of all their demand and causes of action against the defendant for opening and using Jackson street through said tract as aforesaid, and taking and appropriating the portion of said tract for such purposes. The plaintiff files such assignment as an exhibit, the same dated November 3, 1859.

“The plaintiff asks for judgment for eight thousand dollars damages, and interest on the same from the time when Jackson street was first opened and used through the forementioned tract of land.”

To this petition a demurrer was sustained.

R. M. Field, for plaintiff in error.

The prejudice in the mind of the judge below against the

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present action probably had its origin in the circumstance that there is no precedent for such action against the government. The rule is well established that for a wrong committed by the government in the exercise of its right of eminent domain, no suit can be maintained against the government itself in the courts of justice. This rule, however, does not arise from any peculiarity of this particular right, but is general, extending to all the debts and obligations of the government. It has its foundation in public policy, is regarded as the special prerogative of the government, and can never be claimed by private individuals or corporations.

When the power of eminent domain is illegally or unduly exercised by the government, one appropriate remedy for the party aggrieved is an action of trespass against the officers or agents through whose instrumentality the wrong is done; but when, as in the present case, the power is delegated by the government to a corporation, the latter is responsible for the abuse of the power in like manner as for the abuse of any other of its chartered powers.

It is now well settled by authority that a corporation is liable for wrongs committed in the exercise of its chartered powers to the same extent as an individual.—*Goodloe v. Cincinnati*, 4 Oh. 518; *Akron v. Macomb*, 18 Oh. 229; *Thayer v. Boston*, 19 Pick. 516; *Bacon v. Baltimore*, 2 Amer. Jur. 208; *Bissell v. R.R. Co.* 22 N.Y. 258. In the last cited case, the court, in its opinion, says: "Corporations, like natural persons, have capacity to do wrong; and when, in their contracts and dealings, they break over the restraints imposed upon them, an exemption from liability cannot be claimed on the ground that they have no power thus to act."

Angehl & Am. (Corp. § 311) sum up the law on this subject in these terms: "As natural persons are liable for the wrongful acts and neglects of their agents done in the course and within the scope of their employment, so are corporations upon the same grounds, in the same manner, and to the same extent."

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By reference to the charter of St. Louis, it will be seen that general power over streets is granted to the city in these words: "8. To open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve, clean, and keep in repair, streets," &c.

A particular mode of ascertaining damages to property owners is enjoined by 2d sec. of the charter of 1853, as follows: "Whenever the city council shall provide by ordinance for establishing," &c., "any street," &c., "and it becomes necessary for that purpose to take private property, and no agreement can be made with the owner thereof, just compensation shall be made therefor to the person whose property is so taken, which the mayor shall cause to be ascertained by a jury," &c.

The petition, in the present case, sets forth in substance, that the defendant, without any notice to plaintiff, or making or offering to him any compensation, has opened and used a public street through the plaintiff's land, taking for that purpose the quantity of about one acre and a half, and continues to use the same to the present time; for which the plaintiff seeks to recover the value of the land thus taken. That a cause of action is here set forth is too plain for argument; and it is not material whether, under the old practice, the form of the action should have been trespass case, assumpsit, or debt.

In all cases where the property is rendered by the trespass unfit for use by the proprietor, the just measure of damages is the whole value of the property; this was so decided in the case of *Jones v. Gooding*, 8 Mees & W. 145, where it appeared that a trench had been cut on the plaintiff's land and the soil taken away, and the court decided that the plaintiff was entitled to recover the whole value. So in *Mueller v. R.R. Co.*, 31 Mo. 262, where the Iron Mountain R.R. Co. had entered upon the plaintiff's land, made a road-bed, and ran their trains over it, our own Supreme Court held that the just measure of damages was the whole value of the land. It

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is believed that the case now before the court cannot be fairly distinguished from the one just cited.

The seventh objection taken in the demurrer is that the city had no lawful authority to take land in the manner charged in the petition. The plaintiff agrees to this proposition; it is, in truth, the precise statement of the plaintiff's grievance. The plaintiff would have had no just cause of complaint if the city and its agents had proceeded in the mode directed in the charter.

It has been urged, in argument, that the mode of ascertaining the damages provided in the charter is to be taken as exclusive of all others; and, in this connection, stress is laid on the provisions for assessing the owner and adjoining proprietors for benefits, which could not be done in ordinary actions. In answer to this, it may be said that where a particular remedy is given by statute for a pre-existing right, unless there are excluding terms, the old remedies remain. (*Shepherd v. Hills*, 32 Eng. L. & E. 533; *Crittenden v. Wilson*, 5 Cow. 165; *Selden v. Canal Co.*, 24 Barb. 362; *Carr v. Georgia R.R.*, 1 Kelly, 536.) The more decisive answer is that the charter of the city does not profess to give any remedy to the property owner; it simply provides a method by which the city can, if it please, ascertain the compensation through the action of its officers. The property holder cannot originate the special proceedings, nor in any way control them.

In regard to a contribution by the plaintiff for benefits received, it seems reasonable that the jury, in the present case, should consider them in the damages; but in respect to adjoining proprietors, their contributions could not be assessed, and would be lost to the city through its fault in not instituting the proper proceedings for condemnation—a result which the city ought not to be permitted to complain of.

If the present action were regarded as substantially an action of assumpsit under the old practice, the result would be the same. It is well established that where the property of one is wrongfully appropriated by another, the party

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injured may waive the wrong and sue in assumpsit for the value. If it be objected that there was no contract, the answer is that where property is wrongfully taken, the law will imply a promise to pay for it. Accordingly, assumpsit for goods sold and delivered is a concurrent remedy with trespass and trover. (*Chambers v. Lewis*, 2 Hilton, 591, and cases cited.) It is true that the rule is, for the most part, restricted to the case of taking personal chattels, and ordinarily would not apply to a trespass to lands. This distinction is founded simply in the reason, that ordinarily the title to land passes only by deed. In the present case, the ground of the distinction does not exist; for it is settled law, that to transfer real property to public use no deed is necessary, and nothing more is requisite than the assent of the proprietor. (*Hannibal v. Draper*, 15 Mo. 634; *Stacy v. Miller*, 14 Mo. 478.) Accordingly, such actions have been maintained without objection, as in the case of *McKee v. St. Louis*, 17 Mo. 184; in which case the late Judge Richardson was counsel for the defendant, and took no exception to the form of remedy. (*Bloodgood v. M. & H. R.R. Co.*, 14 Wend. 52.)

Casselberry, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The City of St. Louis has power, by its charter, "to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve, clean, and keep in repair, streets," &c.; and by the 2d section of the 4th article of its revised and amended charter, approved March 3, 1851, (Sess. Acts 1851, p. 155,) it is provided that "whenever the city council shall by ordinance establish, open, widen, or alter any street, lane, avenue, alley, wharf, or public square, and it becomes necessary for that purpose to take private property, and no agreement can be made with the owner thereof, the corporation shall make a just compensation therefor to the person whose property is so taken." The section then further provides, with minuteness and detail, the manner in which property shall

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be acquired for making streets. The whole burden is devolved on the city of taking the initiative to procure the condemnation, and no provision is made by which the value can be ascertained or the quantity of damages assessed by the voluntary action of the owners of the property. Where the Legislature authorizes an act of this kind, the natural and inevitable result of which will be to damage or appropriate the property of another, and at the same time points out the mode, at the election of either party, how these damages can be ascertained and redress obtained, the common law remedy will be taken to be superseded and the statutory remedy exclusive (*Lindell's adm'r v. Han. & St. Jo. R.R. Co.*, decided at this term); but where no such remedy is given at the election of the party complaining of the injury, the common law right of action remains unaltered. In this case, the city proceeded to take and appropriate the plaintiff's property without pursuing the mode prescribed in its charter authorizing it to enter upon and use for its own purposes the land of another whenever it should be considered necessary or expedient for the furtherance of the public interests. The act done, then, was without authority of law; it was wrongful, and amounted to a trespass.

There is a well recognized distinction, as to liability, between the acts of a municipal corporation in the discharge of such legislative functions as have been delegated to it by the State, and those acts which are done by a mere private corporation in the prosecution of enterprises for its own advantage or benefit. In the former instance, no action can be maintained holding it responsible, where it is pursuing, in a legal manner, the power thus delegated to it; and this is all that is decided in the cases of *Gurno v. St. Louis*, *Taylor v. St. Louis*, and *Hoffman v. St. Louis*, to which we have been referred. Those cases were decided on correct principles, and we are not going to disturb them. If the city authorized the property to be taken, or if, after it was so taken and appropriated to public purposes by its agents or officers, their acts were ratified and confirmed, we do not see on what prin-

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ciple an exemption can be claimed from making reasonable compensation. To say that no liability was incurred because the taking was wrongful and not in conformity with law, and yet to continue to use and retain the property as a public street, and, when payment is demanded, reply that the fee to the premises is still in the plaintiff, as the original appropriation was tortious and therefore no obligation arises,—seems to be arguing in a circle, and is equivalent to a total denial of justice.

A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done at its command, by its agents, in relation to a matter within the scope of the purpose for which it was incorporated. (Ang. & A. on Corp., § 311; *Watson v. Bennett*, 12 Barb. 196.)

Accordingly, it has been held that a municipal corporation will be liable, where acts are done by its authority which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government invested with jurisdiction to act for the corporation upon the subject to which the particular act relates, or where, after the act has been done, it has been ratified by the corporation. (*Thayer v. Boston*, 19 Pick. 511; *S. P., Smith v. Birmingham Gas Co.*, 1 Adolph & Ellis, 526; *Eastern R.R. Co. v. Brown*, 2 Eng. L. & E. 406; *Underwood v. Newport Lyceum*, 5 B. Mon. 130; *Boom v. City of Utica*, 2 Barb. 104.)

The city, in proceeding to take and appropriate the property to public use, was attempting to exercise the right of eminent domain; but here the law most carefully and scrupulously protects individual property, and the language is that private property shall not be taken for public use without just compensation.

In regard to the measure of damages, it has already been prescribed by this court in *Mueller v. St. Ls. & Iron Mountain R.R. Co.*, 31 Mo. 262, a case involving essentially the same principle. It was there held on the authority of *Jones v. Gooding*, 8 Mees & W. 145, that in an action for damages

for wrongfully entering upon land and taking and carrying away the soil, &c., the proper measure of damages is not the actual damages sustained, but the value of the land removed; and as the defendant has taken and appropriated to its own use the land used as a street, its fair and reasonable value will afford the criterion in estimating the damages.

It has been suggested that, as this is an action in the nature of a trespass, a judgment for the plaintiff would be no bar to the prosecution of another action for subsequent trespasses, and that a recovery for the full value of the land now would enable plaintiff to take an unconscionable advantage, by prosecuting another suit and again recover for what he had already received compensation. We do not assent to this proposition; we are inclined to the opinion that his receiving full value for the land would *ipso facto* work a dedication thereof to the city. But this question is really of no importance, as the plaintiff proposes to make and deliver a deed upon payment of the value of the property. Such being the case, the language of Judge Napton, in the case above alluded to, is peculiarly and strikingly applicable: "If any inconvenience results to the company from their liability to repeated actions, it is the result of their own neglect to have the land condemned, as they were authorized and required to do by their charter. A question might arise, in the event of a second action, or in a proceeding by the company, under their charter, to obtain the title, whether the damages in such subsequent proceeding would not necessarily be nominal or to some extent affected by the present judgment; but as the plaintiff proposes to make the company a deed, and considers the present suit as a final adjustment of his claim, any opinion in relation to the difficulties suggested is unnecessary."

The judgment is reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

Reardon v. St. Louis County.

MARY REARDON, Plaintiff in Error, v. ST. LOUIS COUNTY,
Defendant in Error.

1. *Action—Counties.*—Counties are *quasi* corporations, created by the Legislature for purposes of public policy, and are not responsible for the neglect of duties enjoined on them, unless the action is given by statute.

Error to St. Louis Circuit Court.

Garesché, for plaintiff in error.

I. The petition is sufficient.

II. The plaintiff was entitled to recover. (§§ 3 & 4 of "Act concerning damages," R. C. 1855, p. 648.)

III. By the laws applicable to St. Louis county, it is compelled to keep in repair the roads, bridges and highways of certain routes, *inter alia*, the Bellefontaine road, and, to carry out the purpose, is clothed with the power to borrow money, levy taxes and collect toll. (See act concerning roads and highways; "Volume of Laws applicable to St. Louis county," § 2, p. 379; § 5, p. 380; § 12, p. 381; § 2, p. 386, concerning tolls; § 2, p. 391, authorized to borrow money; § 1. p. 393, "to open and to keep in repair all public roads in St. Louis county"; § 11, p. 396, to open and keep in repair "may tax"; § 14, p. 396, may apply tolls to the keeping in repair roads and bridges, and opening new roads; § 15, p. 396, county court may employ such surveyors, engineers and agents necessary to open and keep in repair the roads of said county, and for the erection of bridges and other work on said roads; § 19, p. 396, may take other county funds for these purposes; § 21, must collect such rate of toll as shall be reasonable and just, to apply the same to keeping said roads in repair.

IV. A defective bridge, or the want of a suitable barrier to a bridge or road, is a defect for which a company can be held responsible. (*Randall v. Prop'rs Cheshire Turnpike Co.*, 6 N. H. 147; *Townsend v. Pres't & Direc's of Susquehanna Turnpike Co.*, 6 John. 90; *Wheeler v. Troy*, 20 N. H.

86	555
96	555
101	188
110	555
113	555
125	555
143	555

86	555
176	515
86	555
179	406

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78 ; Coggswell v. Livingston, 4 Cush. 308 ; Norris v. Litchfield, 35 N. H. 271 ; Willey v. Portsmouth, 35 N. H. 314 ; Tolland v. Willington, 26 Conn., 583, and the cases therein cited ; Hayden v. Attleboro, 7 Gray, Mass., 338 ; Palmer et als. v. Andover, 2 Oush. 600.

A public bridge is a public highway. (McPheeters v. Mera-mec Bridge Co., 28 Mo. 462.)

V. These and the preceding cases show that what is a defect is a question of fact to be found by the jury. (Merrill v. Inh. of Hamp., 26 Me. 234 ; Casseday v. Stockbridge, 21 Vt. 397 ; Commonwealth v. Cent. Bridge Station, 12 Cush. 245.)

VI. Is the County of St. Louis, as a municipal or public corporation, exempt from the present action ? Formerly, undoubtedly it would have been, through the blind devotion of the courts to the case of Russell v. Inh. of Devon, 6 Durn. & East, 671 ; but of late years the law of corporations has been greatly modified under the decisions of our courts. Corporations no longer shield themselves from actions of tort or trespass, or from their contracts, not under seal. (City of St. Louis v. Hospital Ass'n, 15 Mo. 592.) A careful examination of the authorities which shield public corporations from actions, will be shown to rest, all of them, on a single decision, and that the case already quoted of Russell v. Inhab. of Devon. Ld. Kenyon decided that case adversely to the plaintiff, lest the principle would give rise to an infinity of actions ; certainly a very flimsy reason, but principally because the county is not incorporated ; and if incorporated, as the judgment would be against the corporation and not the corporators, the judgment would be fruitless, as there would be no corporate fund out of which to satisfy it.

Why, then, should the doctrine of the Men of Devon be sustained in this State ? Here our counties can be sued, (§ 6, p. 503, R. C. 1855,) and may levy taxes to defray their expenses. (§ 1, p. 1349, R. C. 1855.) The doctrine that counties, as parts of the State sovereignty, can commit no laches, is exploded in this State. (St. Charles Co. v. Powell,

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22 Mo. 527; Callaway Co. v. Nolley, 81 Mo. 393,) and very properly, as the State itself has waived this exclusiveness, (§ 9, p. 1049, R. C. 1855,) and its Constitution provides that it shall be sued. (§ 25, art. 8, p. 69 R. C. 1855.)

Our courts have sustained the decision of the Men of Devon, but have expressly saved the point involved in the present action. (Gurno v. City of St. Louis, 12 Mo. 424; Taylor v. City of St. Louis, 14 Mo. 24; Lambar v. City of St. Louis, 15 Mo. 618.)

Then that we should recover, we cite Bartlett v. Crozier, 17 Johnson, 489; City of Tallahassee v. Fortuna, 3 Flor. 25; Bacon v. City of Boston, 8 Cush. 174, which seem to be decided on common law principles and without reference to any statute; McCombs v. Akron, 15 Ohio 479, re-affirming Rhodes v. Cleveland, 10 Ohio 159—in this last case, Russell v. Men of Devon is very correctly criticised. Ross v. Madison, 1 Ind. (Carter) 281; Wayne Co. Turnp. Co. v. Berry, 5 Ind. 286; Wheeler v. Troy, 20 N. H. 77—that the remedy exists at common law and independently of the statutes. The force of this decision, however, is impaired by that of Bell v. Town of Winchester, 32 N. H. 435, and in which the principle is questioned, though the case of Wheeler v. Troy is neither quoted by counsel nor mentioned by the court, (Hutson v. City of New York, 5 Sanford, 296,) and in which the authorities are reviewed. Seagraves v. City of Alton, 13 Ills. 366; Browning v. City of Springfield, 17 Ills. 148—a very elaborate review of the cases pertinent to the question. In Commr's v. Martin, 4 Mich. 557, the principle of Russell v. Men of Devon is affirmed because the commissioners can assess only \$250 for repairs; but where, as in the instance of St. Louis County, they have the power to tax for the necessary funds, the decision would not apply. (Conrad v. Village of Ithaca, 16 N. Y. 161, and cases cited in note a., containing a thorough review of the question. (Storrs v. City of Utica, 17 N. Y. 104; Mayor of Baltimore v. Marriott, 9 Md. 178—quoted also in Mayor of Baltimore v. Eschbach, 18 Md. 283; Hammer v. City of Covington, 3 Met., Ky.,

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499; *Erie City v. Schwingle*, 22 Penn., 384; *Chicago City v. Robbins*, 2 Black. U. S.) The case of *Nebraska City v. Campbell* (2 Black. U. S. 590,) is a case in point. Judge Nelson, in the decision, uses this language: "The charter vested in the city council the title to all of the streets within the corporate limits, and it is made their duty to construct and improve the same at the public expense; for this purpose and others, the council are authorized to levy a tax on all the taxable property within the city. This provision in respect to streets necessarily embraces all bridges within the limits of the city, and constituting a part of the street." This doctrine goes far beyond the principle for which we contend.

VII. Another principle we maintain, and that is that there would be no question of the law if the defendants were a turnpike company. Why, then, should the county, thus allowed to enjoy all the powers and privileges of a turnpike corporation, not be held to the same accountability; and this power to build turnpike roads and collect tolls be treated as, in this respect, one of emolument, and for which the county is to be held responsible just as any ordinary individual? (*Detroit v. Correy*, 9 Mich, 165.)

S. H. Gardner, for defendant in error.

The plaintiff's counsel has failed through the whole case to draw the proper distinction between the defendant "the County of St. Louis," and the county court of St. Louis county, and between State roads and county roads. The Bellefontaine road mentioned in the petition is a State and not a county road. (See "An act about roads in St. Louis county," Sess. Acts 1849, p. 591, §§ 2 & 3; also, Laws applicable to St. Louis county, p. 379, §§ 2 & 3.)

The county, as a corporation, has no control over the State roads. The county court in directing the expenditure of the road fund, is exercising its statutory jurisdiction over roads as a branch of the State judiciary. In exercising that jurisdiction, whether it does what it ought

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not to do, or fails to do what it ought to do, the county can in no event be made liable, any more than it can for the acts of omission of the Circuit Court. The Legislature has seen fit to give in charge of the county courts all matters relating to guardians, minors, lunatics, idiots, insane persons, apprentices, roads, &c., and counties are not liable in damages for the action of the court in exercising its discretion in any of these matters. This doctrine was fully established in the case of *Miller v. Iron County*, 29 Mo. 122. The opinion of the court in that case will apply with equal force to the case at bar: where a duty judicial in its nature is imposed upon a public officer or a municipal corporation, a private action will not lie for delinquency or misconduct. (*Wilson v. the Mayor of New York*, 1 Den. 595-600.)

In regard to the pleadings and liabilities of officers, see *Bartlett v. Crozier*, 17 John. 438.

A municipal corporation is not liable for the malfeasance or non-feasance of one of its officers in respect to a duty specifically imposed by statute on the officer; otherwise if the duty is one imposed absolutely by statute on the corporation as such. (*Martin v. Mayor, &c., of Brooklyn*, 1 Hill, N. Y., 545-551.)

The counsel for plaintiff, in the case at bar, has failed to observe that no duty whatever is imposed upon the county—the corporation; but the duty is imposed upon, and the discretion is confided to the county court, as it might have been to the Circuit Court or Common Pleas.

The plaintiff's counsel has failed to note the distinction between a private corporation, exercising its corporate functions for the benefit of its members, and public corporations, instituted for the purpose of government. (2 Hill, S. C., 571; *Am. Lea. Cs.* 469; 9 Mass. 237.)

The case of *Russell et al. v. the Men of Devon*, 2 Durn. & East, 308, continues to be good authority to this day; and although the principles established in that case have in some instances been criticised, they have never yet been overruled by any respectable authority.

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WAGNER, Judge, delivered the opinion of the court.

This is a writ of error to Circuit Court of St. Louis county, which court sustained a demurrer to the plaintiff's amended petition, and gave judgment for the defendant. The plaintiff alleged in her petition that she is the widow of Daniel Reardon, deceased; that the defendant is a corporation having charge of building, making and keeping in proper repair and condition the roads, turnpikes and public highways of St. Louis county, and particularly of a road known as the Bellefontaine road; that the defendant by various statutes is expressly authorized to levy taxes upon the inhabitants of said county of St. Louis for the purpose of keeping in repair the bridges, &c., and that at the time of the death of said Daniel Reardon was, and for a long time before had been, collecting such taxes; that on said Bellefontaine road there is a bridge across a stream known as Gingras river, and that through the neglect and default of said defendant to provide proper guards to said bridge necessary for the due protection of persons passing or travelling on and along said road, the said Daniel Reardon, when travelling on said Bellefontaine road and about to cross said bridge, at night, without any fault or negligence of his, stepped off of said bridge, and was then and there killed by the fall. The plaintiff alleged that by reason thereof she has been damaged in the sum of five thousand dollars, for which she asked judgment.

A county is a territorial subdivision, a *quasi* corporation, and is invested with corporate powers for certain purposes. The statute laws of the State establish county courts, and prescribe their powers and duties, giving to them, among other things, the control and management of the county property, the power to levy taxes to defray the expenses of their respective counties, and also certain specific powers in respect to opening and repairing roads and highways.

The powers of the county court, and what precise relation it bears to the county, we are to ascertain from the numerous acts which have been passed from time to time by the Legislature, conferring jurisdiction upon it. It is nowhere declared

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that the county court is the general agent or representative of the county ; it is a part of the State government, with specific powers, duties and functions, generally local to the county, it is true, but derived from the State and not from the county, and subject to be altered or changed at the will of the Legislature, without regard to the will of the county. It acts independently of the county in obedience to State laws. Duties imposed upon the county court by the Legislature, it performs as acts of obedience to the Legislature directly, as a State functionary, and not as an agent of the county. It is true, it can bind the county in some contracts, subject it to some legal obligations, and appropriate its money to certain objects ; but these powers it exercises by virtue of authority derived from the State Government, and in obedience to State laws.

The State Legislature has given to the county court of St. Louis county certain powers and duties in respect to roads and highways in that county, and even if we admit that the acts of the Legislature do fully impose upon the county courts the duty to construct and repair and keep in good order the bridges, and that the same acts confer upon it the means of accomplishing that duty, by the levying of taxes upon the property of the people of the county, does it then follow as a legal sequence that the county is responsible for special damages arising out of neglect in keeping a road or bridge in proper condition ? The duty is imposed not upon the county but upon the county court, nor has the county any power over districts and overseers.

By the law of England, the duty of keeping roads in repair devolved on the parishes, and this obligation was absolute and irrespective of any resources or means for that purpose ; it was founded on prescription and immemorial usage. But this never formed a part of the common law of Missouri. The law will not impose a duty where the means of performing it do not exist.

The counties, as such, have no control over the repair of roads ; they choose the county court, and there their power

ceases. The statute gives to the county court, in express terms, the care and superintendence of the highways and bridges of the county, and confers upon it all the powers requisite to the execution of the trust; and it derives all its authority, not through the county, but directly from the statute. The county has no authority to give any direction or instruction to the county court as to the proper performance of its duty.

Upon a whole view, therefore, of the plain provisions of the statute, we are led irresistibly to the conclusion that no such broad and onerous obligations rest upon the county.

But there is another consideration. The fact that no precedent exists for an action of this character, is very strong evidence that it cannot be maintained. Accidents and injuries on roads are of frequent occurrence, and it is singular if this remedy exists, that it should have remained undiscovered during the whole period of our State organization.

We have examined some of the cases referred to by the counsel for the plaintiff in error, from the New England States, and find that they have no bearing on this question, for the reason that the statutes in these States expressly provide that the towns shall be liable to actions at the suit of individuals for their private damages.

In *Riddle v. the Prop'rs of the Locks and Canals on Merrimac River*, (7 Mass. 169,) Ch. J. Parsons takes the distinction between *quasi* corporations and corporations created for the benefit of the corporators themselves, holding that the former are only liable to information or indictment for a neglect of duty, while the latter are liable to a civil action also, and cites the cases of *Russell v. the Men of Devon*, (2 Term. 669,) and the *Mayor of Lynn v. Turner*, (Cook, 86,) as authority for the distinction. And in *Mower v. Leicester* (9 Mass. 247) the court held that corporations created for their own benefit stood on the same ground in respect to liability as individuals; but that *quasi* corporations, created by the Legislature for purposes of public policy, are not responsible

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for the neglect of duties enjoined on them unless the action is given by the statute.

We see no error in the judgment of the court below. Judgment affirmed. Judge Holmes concurs; Judge Lovelace absent.

COMMERCIAL BANK OF KENTUCKY, Plaintiff in Error, v. WILLIAM H. BARKSDALE *et als.*, Defendants in Error.

1. *Bills of Exchange—Protest—Evidence.*—The official protest of a notary is the proper legal evidence of the presentment, demand and refusal of payment of a foreign bill of exchange, and such protest cannot be dispensed with as in cases of inland bills.
2. *Bills of Exchange—Protest—Notary Public.*—The presentment and demand of payment of a foreign bill of exchange must be made by the same notary who protests the bill; it cannot be done by his clerk, nor by any other person as his agent, although he be also a notary. Notaries are public officers, and as such cannot act as partners. A protest made by one notary, when another notary made the demand of payment, is not a legal protest. The protest, or the noting of the bill for protest, must be made upon the same day the presentment is made.
3. *Bills of Exchange—Conflict of Laws—Lex Loci.*—A foreign bill of exchange must be presented for payment upon the day on which it is payable by the law of the place of payment.
4. *Bill of Exchange—Excuse of Notice.*—The drawer of a bill of exchange, who, by his course of dealing with his correspondent, has reasonable cause for believing that his drafts will be duly honored, is entitled to notice of protest.

Error to St. Louis Court of Common Pleas.

This was a suit instituted March 13, 1861, on a bill of exchange, dated at St. Louis, Mo., September 4, 1860, made by William H. Barksdale & Co., in favor of John F. Darby, (acceptance waived) on the Park Bank, New York city, for \$10,000, at four months, endorsed by Darby. The petition averred due protest and notice; also that William H. Barksdale & Co. had no funds at the Park Bank, and that Darby knew this at and before the maturity of said bill.

Defendants, William H. Barksdale & Co., denied that the

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bill was duly presented at maturity to the Park Bank for payment, or that such payment was refused, or that the bill was duly protested for non-payment, or that defendants had any due or legal notice of any such facts. They averred that they had assets in the hands of the Park Bank at the maturity of said draft, and that it is untrue that they had no reason to believe that the bill would be paid; that between the date of said bill and its maturity they had \$600,000 in that bank, and when it matured had bonds and securities exceeding in amount \$75,000; and have had large sums there ever since. Darby answered that he was accommodation endorser of the bill; denied that the same was duly presented for payment, payment demanded and refused, and notice given to him; denied that he had no reason to believe that the bill would be paid; was not aware that it had not been paid until the 16th February, 1861, when he was so informed by a letter received from the Commercial Bank of Kentucky; that from the date to the maturity of said bill he had every reason to believe that it would be paid at maturity, and did so believe.

The case was tried before the court, sitting as a jury, on the 24th January, 1863, and judgment was given for the defendants.

By the bill of exceptions, it appears that the plaintiff gave in evidence the bill of exchange and the charter of the Commercial Bank, and the testimony of Turney, Varnum, Macy, Meyers, Cole, Dallam, and Boyle. By these it appeared that the bill was protested on the 5th January, 1861; that payment was demanded by Turney, a notary; that the protest was by Varnum, notary public, and that after the commencement of this suit Turney made out a notarial act of protest, dating it back to January 5, 1861; that notice of protest was sent to William H. Barksdale & Co., at St. Louis, Mo. on the 7th January, 1861, after 10 o'clock, A. M., and that the notices for Darby and the Commercial Bank were sent to Mr. Flourney, president, on the same day. That the 4th day of January, 1861, was a day of fasting and prayer

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ordered by the President of the United States and the Governor of the State of New York. By the statutes of New York, read in evidence, it appeared that no days of grace are allowed on drafts or checks on banks, and that all bills falling due on a fast day are to be taken as due in the same manner as if the fast day, &c., were a Sunday. The 5th of January, 1861, was Saturday, and the 7th day therefore Monday.

By the testimony of Cole and Dallam, officers of the Commercial Bank of Kentucky, it was made to appear that they received on the 14th January, 1861, the notices of protest, and that they sent the notice directed to Mr. Darby, to him by depositing it in the mail that same day post-paid. They denied having sent any notice to Messrs. Barksdale & Co.

Defendants read the evidence of C. C. Reuss, taken at Frankfort-on-the-Maine, whence it appeared that he was confidential clerk for Barksdale & Co. from 4th September, 1860, to March, 1861. That about the 18th or 19th January, 1861, Barksdale & Co. received notice of the protest of a draft for \$10,000, of which Darby was endorser; this came from Paducah, Kentucky; in the same envelope was a notice directed to John F. Darby; the books of Barksdale & Co. showed no such draft; the books were wrong; they showed J. J. Anderson to be the endorser of this draft. Two or three days thereafter, Mr. Darby came to the office (counting-room) of Barksdale & Co.; Mr. Barksdale mentioned the arrival of the notice; the books were examined and shown to Mr. Darby in corroboration of the assurance that he was not the endorser of this draft; that Barksdale & Co. had transactions with the Park Bank amounting to upwards of \$600,000, between the month of September, 1860, and the 5th January, 1861; they withdrew their account in February, 1861; it was then upwards of \$80,000, chiefly in Missouri bonds.

Judge Wood was examined to show that Turney's protest had been made since the commencement of this suit; suit was commenced March 13, 1861. Mr. Wise testified that,

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when as agent of the Commercial Bank of Kentucky, he called on Darby and asked him to pay this bill, he flatly and explicitly declared that he was not liable on it, and did not mean to pay it. Mr. Barksdale testified that he received from Paducah about 18th January, 1861, a protest for this bill of \$10,000, enclosing also one for Darby. He gave to Darby the one intended for him two or three days afterwards, or else made him aware of it. Soon after this, his lawyer told him that both the drawers and endorsers were discharged. By advice of counsel, he made a deed of trust to secure Mr. Darby for other endorsements without Darby's knowledge; he included in this deed this draft as one endorsed by Darby, and against the consequences of endorsing which he desired to indemnify him. Darby was merely an accommodation endorser. The deed of trust was to secure \$28,000 of liability of Darby as endorser besides this bill of \$10,000; the deed of trust was not enough to secure the \$28,000.

The plaintiff objected to Barksdale's testifying, as he was a party to the suit. The court admitted him only so far forth as he testified in respect of matters tending to the exoneration of Darby only. Plaintiff excepted.

Mr. Clement, an employee of the New York Post-office, testified that during the first half of January, 1861, there were two daily mails from New York to Kentucky, one of which was closed at 5 A. M. and the other at 3.30 P. M. This was all the evidence except an admission that the 4th January, 1861, was a regular fast day, and that the cases of 20 Wendell, 205, might be read in the Supreme Court from the printed volume, the same having been read in evidence to the court below.

At the instance of the plaintiff, the court declared the law to be as follows :

1. That as the draft sued on was payable in New York, it is governed by the laws of that State as to presentment, demand and protest.

2. That the draft sued on was not entitled to any days of grace.

3. That inasmuch as it matured on the 4th day of January, 1861, which was a day set apart by the President as a day of fast, it was properly presentable on the 5th day of January, 1861.

4. That if the 6th day of January, 1861, was Sunday, the notice of protest would be properly given on the 7th January, 1861; and if the jury find from the evidence that the notice to Barksdale & Co. was sent on that day by mail, postage pre-paid, to Barksdale & Co. at St. Louis, and to Commercial Bank of Kentucky at Paducah, the said notices were duly given.

5. If the court find from the evidence that the Commercial Bank at Paducah sent on the day, or even the day after the said notices of protest were received, the same to John F. Darby at St. Louis, by mail, postage pre paid, the said notice was sufficient.

6. That it is not material that Darby ever should have received the notice of the protest, if the notice was in fact regularly and duly enclosed to him by mail, directed to St. Louis, Mo.

8. If the Metropolitan Bank, New York, held the bill for collection, and had the possession of it as such holders when it matured, and so holding and having possession of the bill they delivered it to the witnesses Varnum and Turney, whose depositions were read in evidence, to be presented for payment, with instructions, if not paid, to protest the bill for non-payment and give notice thereof to the parties to the bill; and if, further, the said Varnum & Turney were then attorneys-at-law, and as such doing the business of the Metropolitan Bank, and were both notaries public, then in such case they were agents of the Metropolitan Bank, and a notice given to the parties by either of them of the dishonor of the bill by non-payment on presentation, was legally proper and sufficient; and although the court may find that demand was made by the at-

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torney and notary Turney, it was competent and sufficient for his partner, the attorney and notary Varnum, to give notice to the parties, and the mere fact that his name and official character is in print on the notice given, and that he does not on the face of the notice claim to be agent, does not invalidate the notice.

If, in fact, under the circumstances herein stated, the notice was given by said Varnum, on the request of said Metropolitan Bank, then in such case the notice came from said bank, and is from a party in interest authorized to give notice of protest.

10. The fact that the notary Varnum drew up and attached his certificate to the bill sued on, under the circumstances as explained by the evidence of said Varnum and Turney, does not render Turney's certificate invalid simply and merely because subsequently drawn up by said Turney.

Plaintiff's instructions refused :

7. A copy of the protest need not accompany the notice of dishonor of a bill. If a bill be properly presented for payment, and the payment refused, and notice thereof be properly given, stating, in addition, the protest of the bill, the formal documentary protest may be drawn up afterwards before the trial ; and if so drawn up, the same will constitute a legal protest of the bill, though not made out at the time of the dishonor of the bill, nor previous to giving notice of protest.

9. It is not necessary to the validity of a certificate of protest, that it be drawn up on the day of demand and refusal of payment, nor is it necessary that such certificate, or a copy thereof, should be sent with the notice. It may be drawn up when called for, or at any time before trial, provided the bill was properly presented for payment by a notary public at the request of the holder, and payment demanded and refused, and a proper notice of the protest is given and in due time.

The following instructions were given for defendants :

1. In order to entitle the plaintiff to recover judgment

against the defendant Darby in this case, it is necessary for it to satisfy the jury, by evidence, that the bill of exchange sued on was, at its maturity, presented at the place where payable for payment; that payment was then and there demanded and was refused; that the said bill was duly protested for non-payment, and that the defendant had due notice of such demand, refusal and protest.

8. To make a valid presentment by a notary, it is necessary that such notary make a personal presentment and demand, and a protest of a bill by a notary who did not make such presentment and demand is insufficient to hold the endorser.

8. If the jury believe from the evidence that the only notice of dishonor of the bill sued on was furnished from Paducah to St. Louis in an envelope, addressed to Wm. H. Barksdale & Co., St. Louis, and was never delivered to or received by said Darby within two days after said notice reached St. Louis, then the defendant Darby is not liable in this case, and the jury will find for said defendant Darby.

9. If the court believe from the evidence that the bill of exchange sued on was not protested for non-payment by Turney until after this suit was instituted, such protest is not sufficient to render the endorser liable.

10. If the court believe from the evidence that J. B. Varnum never presented the bill sued on for payment, then his protest is of no effect.

13. Unless the bill sued on was legally protested at maturity, plaintiff cannot recover. If Varnum protested the bill on the presentation made by Turney, this is insufficient in law.

15. If the notary who protested the bill in New York, made out notices thereof for the cashier of the plaintiff and defendants Darby, Barksdale & Co., and enclosed the notices to plaintiff and said Darby with a copy of the notice to Barksdale & Co. in one envelope and package, mailed the same, addressed to the cashier of plaintiff, Paducah, Kentucky, and that plaintiff, by its agent, enclosed the copy of

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the notice to Barksdale & Co. and the notice to said Darby in one package and envelope, and deposited it in the mail, addressed to Wm. H. Barksdale & Co., St. Louis, these facts do not constitute sufficient notice to charge the defendant Darby.

19. Unless the witness Turney, as a notary, noted the bill for protest, or actually protested the bill on the day of its maturity, the protest of said Turney is not sufficient in law.

L. Hunton, for plaintiff in error.

Barksdale & Co. were not entitled to notice, for they had not provided for the payment of the bill, and had no reason to expect it would be paid. How could they reasonably expect the bill to be paid, unless they allowed the bank to pay it? The Park Bank was not authorized to sell the securities which they held, and pay the draft without the order of Barksdale & Co. If Barksdale & Co. were not entitled to notice, then they were not discharged by any irregularity in the protest. (*Rhett v. Poe*, 2 How. 457; *Byles on Bills*, 204-34; *Sto. on Bills*, § 280.)

A verbal notice of the dishonor of a draft is sufficient. The protest of a foreign bill is necessary. We offer the protest of Turney, the notary who protested the bill; it is in due form in every respect. It does not appear when it was made; the presumption is that it was made out at the proper time; it is his official act. No proof has been offered as to the particular day or time when it was formally made out; it is a mere inference that it was not made out when the bill was dishonored, because it seems that Varnum made a protest, which is also in the record.

We insist that our case is fully made out with Turney's protest. As to the certificate of protest made by Varnum, we submit that it by no means is nullity for the reason that he did not make the presentment and demand, but the effect of his failure is that his certificate could not be offered as conclusive proof of that fact, and for that reason the testimony of Turney was taken to prove protest and demand.

Turney's certificate was sufficient, for he was the notary who presented the bill, and even if it were out months afterwards it is sufficient, if any note or memorandum of the presentment and demand had been made. He had the formal statement made up by his amanuensis Varnum, his partner; the "noting," by placing initials and dates on bills, is wholly unknown in this country.

In case there was something more extended and formal. A protest need not accompany the notice; it may be made out years afterwards. (17 How. 606; Cayuga Bank v. Hunt, 2 Hill. 638; Sto. on Bills, § 302, & note; Byles on Bills, 203-4.)

T. T. Gantt, and Knox & Smith, for defendants in error.

The main inquiry here is respecting the validity of the protest. The man who made the presentment neither noted the bill for protest, nor did anything towards protesting it, until after the commencement of this suit. The man who drew up the protest had nothing to do with the presentment; was there, then, a valid protest?

I. Defendants in error contend that by its very terms the protest can only be made by the person being a notary who made presentment and demand. (Byles on Bills, 146 & 255-6; Sto. on Bills., §§ 276 & 278; Chit. on Bills, p. 489-92; 4 How., Miss. 567; 3 McLean, 481; 6 B. Mon. 60; 7 Humph. 848; Edw. on B. & N. 466.)

II. That the noting at least, or incipient protest, should be made on the day on which payment is refused. (Bul. N. P. 272, quoted in Byles on Bills p. 146; Chit. on B. 492; Leftly v. Mills, 4 T. R. 174; Buller, J., 1 Sel. N. P. 302.)

III. No question can arise here whether a notarial act of protest may be made upon a presentment for payment by the notary's clerk and his (the clerk's) memorandum, or noting of the refusal. As to the law on this subject, see note (a.) to p. 493, Chit. on Bills. But in this case, no such facts existed and no such question can arise.

Com. Bank of Ky. v. Barksdale et als.

HOLMES, Judge, delivered the opinion of the court.

The decision of the case turns mainly upon the validity of the protest. The bill is to be considered as a foreign bill. (Sto. Bills, §§ 22-3.) In cases of foreign bills of exchange, the rule is too well settled to admit of question, that there must be a protest of the bill by a notary public, in all places where such officer is at hand. (Sto. Bills, § 276.) The notarial protest is evidence of presentment, demand, and refusal to pay the bill, at the time and in the manner therein stated. This rule of the law merchant is recognized by statute in this State (R. C. 1855, p. 298, § 20); and so essential is the production of a protest in all cases of foreign bills, that this evidence of presentment, demand and refusal cannot be dispensed with, nor supplied by other evidence of the same facts, as may be done in cases of inland bills. (Sto. Bills, § 276.) It is equally well established that the presentment and demand must be made in person by the same notary who protests the bill; it cannot be done by a clerk, nor by any other person as his agent, though he be also a notary. The protest is to be evidence of the facts stated in it, of which the notary is supposed to have personal knowledge, and credit is given to his official statements by the commercial world on the faith of his public and official character.

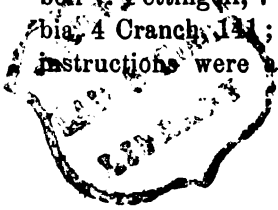
In court, the instrument speaks as a witness. Such statements made merely upon the information of another person would amount to hearsay only, if the notary were himself upon the stand as a witness. The notarial protest must state facts known to the person who makes it, and he cannot delegate his official character or his functions to another. (Edw. on B. 466; Leftly v. Mills, 4 T. R. 174; Carmichael v. Bank of Penn., 4 How., Miss. 567; Sarcider v. Brown, 3 McLean, 481; Onondagua Co. Bank v. Bates, 3 Hill. 53; Chenoweth v. Chamberlain, 6 B. Mon. 60.) The presentment and protest are governed by the law of the place where the bill is payable, and on this principle it has been held that

where the statute law of the State (as in Louisiana) authorizes notaries to appoint deputies, a protest made by such deputy, duly appointed, would be recognized as sufficient. (*Caster v. Brown*, 7 Humph. 548.) But no case seems to have gone farther than this: such deputy may be considered as having a semi-official character, and sufficient authority by force of the statute; but without some change in the general rule of law, one notary can neither delegate his functions nor impart his own official character to another. Here, two notaries were in partnership in general business, and one of them undertook to present the bill and make the demand, and the other to draw up the protest and give the notice. They were both notaries, but as such they were distinct public officers, and there can be no partnership in such matters. No law or custom was proved to have existed in the State or city of New York, which changes the general rule of the law merchant on this subject. It must follow that the protest made by Varnum can have no validity; nor will that made by Turney any more avail. It seems to be clearly established by the general current of authority that the protest must be made on the same day with the presentment and demand, though a noting of the protest on the bill itself may be regarded as an incipient protest, or preliminary step towards a protest which may be completed afterwards, at any time, by drawing up the protest in form. Here, there was no noting of the bill for protest, nor any memorandum marked on the bill, by Turney; nor is there any proof of any distinct note, entry, or memorandum of protest, made by him on that day, in any other way than upon the bill itself. It would appear that he did not make the demand for the purpose of protesting the bill himself, but as the agent of his partner, the other notary. He neither protested the bill, nor noted it for protest, at the time; and his drawing up of a protest, long afterwards, must be regarded as having no basis of contemporaneous fact or present authority, and as being entirely void. (*Byles, Bills*, 201-203; *Sto. Bills*, § 288; *Leftly v. Mills*, 4 T. R. 174.)

Com. Bank of Ky. v. Barksdale et als.

Under the laws of New York we think the presentment was made, and the notice sent, on the right day (*Loller v. Burt*, 20 Wend. 205); but there being no valid protest, the drawers and endorser were discharged, so far as their liability depended upon a protest and notice; and it will therefore be immaterial to inquire further concerning the notices that were sent.

It is urged on the part of the plaintiff, that the drawers were not entitled to notice, for the reason that they had no funds in the hands of the drawee, and no right to draw the bill. It appeared in evidence that there had been extensive previous dealings between the parties; that within the three or four months next preceding the drawing of the bill, there had been transactions of this kind to the amount of upwards of six hundred thousand dollars; that they had on deposit with the bank as collaterals an amount of bonds and other securities largely exceeding their indebtedness to the bank, this bill included; that a fluctuating balance remained unsettled between them; and that down to the time of the dishonor of this bill, the bills drawn upon the bank had been duly honored. These securities were soon afterwards withdrawn upon a settlement of the comparatively small balance due from them to the bank. There does not appear to have been any express agreement for a credit to any given amount; but on the footing of this previous course of dealing, and these ample securities, the drawers may very reasonably have counted upon a prompt payment as usual. At any rate, it cannot be said that they had absolutely no funds in the hands of the drawee, no right to draw the bill, and no reasonable expectation that it would be paid. In such case, the drawee is entitled to notice, that he may take measures to close his account and withdraw his securities. (*Edwds. Bills*, 451; *Blackman v. Doren*, 2 Camp. 503; *Orr v. Maginnis*, 4 East. 359; *Rucker v. Hiller*, 16 East. 43; *Campbell v. Pittingall*, 7 Greenl. 126; *French v. Bank of Columbia*, 4 Cranch. 131; *Robinson v. Ames*, 20 J. R. 146.) No instructions were asked, or given, directly bearing on this



Vallé et al. v. Cerré's Adm'r.

subject. The case seems to have been tried upon the admitted theory that the drawers were entitled to a protest and notice. The evidence on this head was amply sufficient to warrant the instructions which were given, so far as they rested on this basis; and the verdict being for the defendants, we cannot say that it was, in this respect, either without evidence, or against the weight of evidence: on all other points, also, the law appears to have been fairly and correctly laid down in the instructions which were given on either side; and in those refused for the plaintiff, we have not found any substantial error.

The judgment is affirmed. Judge Wagner concurs; Judge Lovelace absent.

JOHN B. VALLÉ *et al.*, Plaintiffs in Error, v. M. S. CERRÉ'S
ADMINISTRATOR, Defendant in Error.

1. *Practice—Parties.*—In an action, for the delivery of personal property, against the sheriff, it is proper to allow the parties interested with the sheriff to be made co-defendants, that they may defend the action and protect their interests.
2. *Bill of Exchange—Acceptance.*—A written contract to accept a non-existing bill of exchange, must point to the particular bill and describe it in express terms. (R. C. 1855, p. 293, § 3.) A general letter of credit is not an acceptance of a particular bill; but a party taking a bill upon the faith of such letter can maintain an action against the promisor to recover the amount advanced.
3. *Practice—Instructions.*—An instruction which refers a matter of law to the jury is erroneous.
4. *Contract—Letter of Credit—Bill of Exchange.*—A. at St. Louis gave to B. at New Orleans a letter of credit, authorizing B. to draw bills of exchange predicated upon actual shipments made to A. to the amount of three-fourths of the value of such shipments. *Held*, that such letter was a general authority, and was to be construed most strongly against the giver of the power; and that a banker, taking a bill thus drawn, could not be required to look beyond the letter of credit, the invoice, and bill of lading, to determine whether B. had exceeded his power by drawing for a larger amount than he was authorized.
5. *Contract—Consignee—Lien—Bailment.*—A. at St. Louis made an arrangement with B. at New Orleans mutually to consign produce to each other for

36	575
44a	575
36	575
36	575
36	575
133	448
36	575
184a	425
84a	425
86a	507
86a	509

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sale, B. being authorized to draw bills of exchange for three-fourths of the value of the shipments made by him, the proceeds of sales to be carried to general account. In the course of business, there was a balance of ten thousand dollars in favor of A. upon general account. B. subsequently made a shipment to A. and drew his bill of exchange predicated upon such shipment, and transferred the bill to C., a banker, showing him the letter of credit, the invoice and bill of lading for the goods shipped. C. advanced to B. part of the amount for which the bill was drawn. *In transitu*, the goods shipped were attached by a creditor of B. A. received the bill of lading and invoice two days before the goods were attached. After the attachment the bill of exchange was presented to A. at St. Louis for acceptance, which was refused. A. subsequently replevied the goods in the hands of the sheriff, and after suit commenced paid C. the amount advanced by him and received the protested bill. *Held*, that A. had such a lien upon the goods that he was entitled to maintain his action, and that his title was better than that of the attaching creditor.

Error to St. Louis Circuit Court.

The facts are stated in the opinion of the court.

At the instance of the plaintiffs, the court gave the following declaration of law :

"If the court, sitting as a jury, finds that the plaintiffs wrote the note—the letter to Titus, dated June 21, 1859" (the letter of credit authorizing Titus to draw for three-fourths of the value of actual shipment), "which was read in evidence—that Titus received this letter prior to 6th August, 1859 ; that he thereupon shipped to the plaintiffs at St. Louis, on the steamboat *Gladiator*, the 300 sacks of coffee in the petition mentioned ; that the bill of lading read in evidence was taken for said shipment ; that thereupon said Titus drew the bill of exchange read in evidence, which he exhibited to Kentzen & Co. with the bill of lading, and the invoice of said coffee read in evidence, and also the said letter of the 21st of June, 1859, and that on the faith of said letter which was shown to them, said actual shipment, and said bill of lading, the said Kentzen & Co. advanced \$2,000 on said bill of exchange and took the same in good faith ; that the said bill of exchange was drawn in conformity to the authority contained in said letter of the 21st June 1859, and that the said bill of lading was received by plaintiffs on the 11th August,

1859, then the plaintiffs are entitled to the possession of the coffee and ought to recover in this action."

Which the court gave, the defendant duly excepting at the time.

The defendant asked the following instructions :

1. The letter of J. B. Vallé & Co. to Titus, dated 21st June, 1859, and read in evidence, as the promise to accept is not an unconditional promise to accept the bills drawn by Titus, and the party taking any such bill must at his peril see to the performance of all the conditions prescribed by Vallé; if the bill be for more than three-fourths of the value of an actual shipment, no matter what deception is practised upon the person with whom the bill is negotiated, there is no obligation on Vallé & Co. to accept or pay any part of such bill.

2. If the coffee in controversy was worth both in New Orleans and St. Louis, at the time when it was shipped on the *Gladiator*, less than \$5,400, then Vallé was not bound by his letter of credit to pay or to accept any bill, or any part of any bill, drawn against the same for more than \$4,050.

3. If the court, sitting as a jury, should be of opinion that Vallé & Co. were bound by their letter of credit to pay the sum of \$2,071.11 which had been advanced by Kentzen & Co. on the draft of \$4,200.11, then, the coffee having been taken on attachment at the suit of Thos. L. Clark & Bro. as the property of Titus, the possession of the sheriff was lawful, and Vallé cannot take it out of his possession merely to enforce a lien for \$2,071.11.

4. That this right of lien of Vallé does not authorize him to take possession of the coffee as against the attaching creditor, who is a purchaser for a valuable consideration.

5. That if Vallé had a lien of \$2,071.11 against the coffee, he should have entered his appearance as a party to the attachment suit of Clark & Bro. v. Titus, setting forth his lien and claiming that so much of the proceeds of the coffee as would reimburse him for the \$2,071.11 should be paid over to him, and he cannot recover in this action.

6. That in case of the coffee not being sold, but merely consigned for sale, the general property remained in the consignor Titus till it reached Vallé's possession; and that if, before reaching his possession, it was attached by a creditor of Titus, then that general property was vested in the sheriff by the levy, and Vallé cannot, by virtue of a special property, recover in this case and take the coffee out of his possession.

All of which instructions the court refused, the defendant duly excepting thereto at the time.

T. T. Gantt, for plaintiffs in error.

I. The plaintiffs in error, for Thos. Clark & Bro., are the real parties in interest, and Cerré was merely their trustee; complain of the refusal of the court below to allow them to be made co-defendants in form.

II. The instructions given assumed as facts several matters which are not facts. Kentzen & Co. did not, on taking the bill, advance \$2,000.11 on it; they refused to do this until they should learn that Vallé had accepted the bill, and they only receded from this position on the 11th August, 1859, yielding to the importunity of Titus. Vallé & Co. allowed this bill of exchange to be protested for non-acceptance on the 15th August, 1859, and for non-payment on the 27th August; they did not get possession of the bill until October, 1859, some two months after this suit was commenced.

The instruction refers to the triers of the fact the ascertainment of the matter of law: "If the court, sitting as a jury, finds that the bill of exchange was drawn in conformity to the authority contained in said letter of 21st June, 1859," &c. (*Butcher v. Death et al.*, 15 Mo. 271.) It was the duty of the court to say whether it was so drawn, the facts being conceded; or to tell the jury to find that it was so drawn, if certain facts were by them ascertained to be true.

This instruction is otherwise defective and vicious. It gives prominence to the matter of good faith on the part of Kentzen & Co. in the negotiation of the bill of exchange. If the bill was in conformity with the letter of credit, it

was already accepted; of this there can be no question either at common law or on our own statute, and therefore the only ground of hesitation must have been that they perceived, or that at least they feared, the conditions of the letter of credit had not been complied with.

The court having failed to interpret the letter of credit in the instruction given at the instance of the plaintiffs below, the defendant endeavored to supply the omission and correct the error thus existing; and to this end the two first instructions were asked. These contained a correct exposition of the law, and should have been given. The letter of Vallé dated 21st June, 1859, clearly was not an unconditional promise to pay all bills drawn by Titus, on shipment to his house, but only bills for three-fourths of the value of such shipment. This letter of credit was shown to Kentzen & Co., and they were admonished, by its terms, of the qualified character of Vallé's undertaking.

The rule of law in this, as in most cases, is the rule of common sense. The authority to draw bills must be strictly pursued. The person promising to honor bills of a certain description, is not bound by that promise to pay bills of a different description; this is illustrated by repeated decisions on this subject. Titus was, by the letter of credit, authorized to draw bills in conformity with its provisions. These Vallé was bound to honor; but he was not bound to accept or to pay, in whole or in part, any bill drawn in disregard of these provisions. (Reed v. Wilkinson, 2 Wash. C. C. 514; Anderson v. Hick, 3 Camp. 179; Storer v. Logan, 9 Mass. 55.) These authorities are in point; they show that, at the time this suit was brought, Vallé had no right to the consignment. He had, on the 15th August, 1859, refused to accept the bill drawn on it; on the day after this suit was commenced, he refused to pay it. He had, then, repudiated all claim as consignee, unless by reason of the letter of credit he was already liable as acceptor: he was wholly unconnected with this coffee; for it would be quite as violatory of legal rules as of common sense to allow

Vallé to repudiate the *onus* while snatching at the *commodum*. *Qui sentit commodum, sentire debet et onus*, is the legal maxim. This matter has been the subject of judicial examination elsewhere; and it has been expressly decided that if a consignee allows a bill drawn on a shipment to be dishonored, he has no right to the possession of the shipment. (Allen v. Williams, 12 Pick. 297; Kinlock v. Craig, 3 Term. 119; Waller et al. v. Ross et al., 2 Wash. C. C. 282; Ryberg et al. v. Snell, 2 Wash. 294.)

Vallé & Co. could only assert a right to the possession of the coffee by reason of having made some advance, or incurred some liability, in respect of this very coffee. They had made no such advances; had repudiated all liability in respect of the bill drawn on account of it; and, as has been shown, were not liable in respect of their letter of credit. They had, then, no right of action, and defendant is entitled to judgment for the return of the property. (Mason v. Barff, 2 Barn. & Ald. 33—Judge Bayley's opinion, on the point of the strictness with which an authority to draw bills is to be construed.) If, in any particular disadvantageously to the drawee, the authority be departed from, the drawee is not liable.

It has been stated that Vallé & Co. were creditors of Titus, on general account, independent of this coffee, in the sum of ten thousand dollars, or nearly. It is not intended to dispute the legal proposition, that a factor may retain, or has a lien on property in his possession, on account of a general balance.

Glover & Shepley, for defendant in error.

I. The instruction given for the plaintiffs was correct. (1 R. C. 1855, p. 293, §§ 1, 2, 3, 4 & 5.) The letter of June 21, 1859, was an unconditional promise to pay a bill drawn in conformity thereto. The bill drawn was in accordance with the instructions; it does not appear that the \$4,200 was more than three-quarters the value of the coffee in New Orleans. It does appear that an invoice of the cof-

fee was delivered to Kentzen & Co., in amount \$5,688.18. This sum embraced the amount paid T. L. Clark & Bro., also, drayage and insurance; these several items made up the cost of the coffee to Titus. He represented \$5,688.18 as the value against which he drew the bill for \$4,200.11. No witness has shown the coffee to be worth more or less than the invoice made out by Titus; what Titus paid for the coffee is not necessarily the full value; the instructions left it in the first instance to Titus to say what was three-quarters the value of the shipment; he said \$4,200.11, and this should be regarded as correct until some proof is brought that it is not; no such proof has been brought. The bill being drawn by Titus in good faith, and in conformity to the letter of credit, and being negotiated for value, Vallé was bound to pay it. Vallé must be considered, then, as having advanced so much money on the consignment for Titus; Vallé thereby became a purchaser of the coffee, a vendee *pro tanto*. This vested in him a legal title to the coffee until the money paid by Vallé to Kentzen & Co. was repaid. In fact, this is conceded as the law of the case. (12 Pick. 297; 2 Barn. & Ad. 932; 2 Wash. C. C. 403; 6 Serg. & R. 429; 2 Bing. 20; 4 East. 211; 1 Ld. Raymond, 271; 3 Paige, 373; 26 Wend. 369; 24 Wend. 174; 3d Term, 119.)

In the last quoted case the court say, a factor who makes advances on a consignment is a purchaser, and has all the rights of a vendee; that Vallé, knowing of the failure of Titus, and not knowing of the negotiation of the bill, declined to accept, or pay, is nothing; he had accepted prior to the drawing of the bill, was bound on the bill, and compelled to take it up; which he did. This gave him a lien on the consignment for the bill, and of course the legal title and right to possession. Factor liens secure the legal title.

II. But the court might have laid down the law more advantageously for the plaintiffs. Vallé held a debt against Titus for \$10,000.11, incurred in regular and continuous dealing, as principal and agent on account of advancements by Vallé. This consignment was, under the facts in evidence,

independent of the Kentzen & Co. bill for that balance. Actual possession of the coffee was not necessary to the attaching of this lien; if, in making the consignment, Titus indicated an intent to pass the title to Vallé, then the lien for this general balance, with legal title and right of possession, rested in Vallé & Co. *eo instanti* that the goods were delivered to the carrier. (Russell on Factors, 45; Law Lib. 202.) Such intent is very manifest; the bill of lading was not in the shipper's name, but in the name of John B. Vallé & Co.; coffee to be delivered to them, they paying freight. This passed the title and right of possession. (1 Ld. Raym. 271; 3 Paige, 373; 1 Binney, 106; 5 Ham. 88; 2 Burgh, 20; 4 Scott, N. C. 43; 1 Bos. & Pul. 536; 4 Mee. & W. 775; 17 Mass. 197; 4 Scott, N. R. 43-53.) Delivery to common carrier is such passing the property out of possession and control of seller as vests title in consignee, subject to right of stoppage *in transitu*. (1 Pars. on Cont. 443; Sto. on Sales, 355—§ 311, *a. b.*—§ 312, *a. b. c. & notes.*)

There was no need of any endorsement on the bill of lading, because the goods were passed by the words on the face; Vallé's rights were the same as if the bill of lading had been in the name of Titus or his assigns, and by him endorsed in blank. The bill of lading had been placed in Vallé's hands before the attachment; this was constructive delivery; and as *prima facie*, it was an absolute title in Vallé. The right to hold for the general balance is made out. To suppose Titus did not intend to pass the property of the whole shipment to Vallé would be unreasonable.

HOLMES, Judge, delivered the opinion of the court.

This case was affirmed at the March term of this court, 1864, and a re-hearing was granted at the same term. The reasons for the decision were somewhat briefly stated, and in such manner as to lead to the supposition that the case had not received that careful consideration on some points which the importance of the questions involved, might seem to demand. It has been re-argued with much learning and abil-

ity, and we have given the subject the most attentive deliberation.

The case may be stated in substance as follows: The plaintiff, a merchant of St. Louis, and one A. Titus a merchant of New Orleans, were transacting business with each other, as factors and commission merchants, the former shipping produce to New Orleans, and the latter shipping groceries to St. Louis, to be sold on commission and the proceeds placed to account, or as purchases to be charged in account, under a special arrangement and mutual understanding between them, that such business relations should be continuous for an indefinite time; that the plaintiff should buy and forward produce to Titus at New Orleans, receiving a commission and drawing bills against the shipment, or charging the amount to the credit of the other in account, and that Titus should make consignments of sugar, coffee, and molasses, to be sold on commission and account, on which the consignee at St. Louis was to make advances within the limit of a general letter of credit authorizing the consignor to draw and negotiate bills on the consignee, against the shipments made, to the extent of three-fourths of their value, at five or ten days' sight, preferring ten, when the shipments were made. This business had continued for about four months, when, on the eleventh day of August, 1859, there was a balance of account due the plaintiff amounting to \$10,000, for advances already made in the course of the business. On the 6th day of August, by bill of lading of that date, Titus consigned to the plaintiff 300 sacks of coffee, and delivered the goods on board the steamer "Gladiator," bound for the port of St. Louis.

He addressed a letter to the consignee, enclosing the bill of lading, in which he was named as consignee, dated Aug. 8, 1859, and the invoice of same date, showing 300 sacks of coffee, 48,919 pounds, at 11½ cents per pound (with insurance and drayage), amounting to \$5,688.18, informing him of the consignment, and saying he had drawn against it for \$4,200 at five days' sight; that it was a good article and he

hoped he would get a good price for it, and would honor his draft, and the next day wrote another letter, saying he had drawn the draft at ten days' sight, the better to suit his convenience. It appears that the 800 sacks arrived at St. Louis, contained 428 pounds less than the invoice, and it was agreed on the trial that the coffee was worth at St. Louis, in August, 1859, 11 cents per pound, and for 48,919 pounds (less freight) amounted to \$5,308.09, and at this calculation the draft was drawn for some \$250 more than three-fourths of the value. On the same day (August 8th) Titus negotiates the draft to Kentzen & Co., bankers at New Orleans, showing them the letter of credit, (dated June 21, 1859,) the bill of lading and the invoice, who thereupon agreed to take the draft, but declined paying over the money on it until they should hear it was accepted; but a few days afterwards (August 11), upon the urgent solicitation of Titus, paid him \$2,000 on account of it. The next day Titus failed and absconded. On the 11th day of August, the plaintiff received the letter enclosing the invoice and bill of lading. Two days afterwards (August 13), the coffee was attached and seized on board the "Gladiator," lying at quarantine, ten miles below St. Louis, at the suit of T. L. Clark & Bro., merchants of New Orleans, as the property of A. Titus, the defendant therein; and it appeared that Titus had bought this coffee of Clark & Bro. on the 6th day of August previous, on a credit of two months, and given his note for the purchase money and interest, amounting to \$5,315.49, for which sum they sued. Afterwards, on the 26th of August, the plaintiff brought this suit and replevied the coffee out of the hands of the sheriff. On the 19th of August the draft was protested for non-acceptance, and on the 27th for non-payment; but in October following, the plaintiff paid Kentzen & Co. the amount of their advance and interest, and took the draft. T. L. Clark & Bro. asked to be made co-defendants with the sheriff and their application was refused. Any person may be a defendant who claims an interest in the controversy adverse to the plaintiff. (Prac. Act, R. C.

1855, p. 1218, § 4.) These claimants were not necessary parties; a complete determination of the matter in controversy may be had without them.

The old action of replevin could be maintained against the sheriff alone in such cases; it is founded upon his wrongful act. He must defend the action here; but the ultimate interest in the result concerns the plaintiffs in the attachment suit more than it does him. We think it would have been very proper for the court to have allowed them to be made co-defendants.

The main question is of the right of property as between the consignee and the attaching creditor; and in order to determine their rights, the matter is to be considered as it stood at the date of the attachment. And the first inquiry is, whether the plaintiff had acquired any lien or property in the goods consigned. He had received the invoice and bill of lading, and the shipment was made, and the goods delivered to the carrier, in pursuance of the arrangement that existed between the parties. The matter is to be considered with reference to this arrangement and the previous dealings of the parties with one another. It is not to be confined to this particular consignment alone, as a separate and independent transaction, standing by itself; in which case, the result might be quite different. It was a part of the arrangement, and evidently well understood by both parties, that the consignee at St. Louis was to make advances on the shipments made to him, and that the proceeds should be placed to the credit of the consignor in account to cover such advances and the general balance of account between them.

The authority to draw bills for those advances, before the arrival of the goods shipped, was limited to three-fourths of the value of the shipment in each particular instance; but it is also plain that the balance of the proceeds of each shipment, over and above the bill that was authorized to be drawn against it, was to be credited in account, and the shipments were intended to be made, and were made, not only to re-

pay the particular advance or acceptance thus made on that shipment, but also to cover any previous advances and the general balance of account that might then be standing against the consignor. This balance had accrued on the faith of this course of dealing, and of such future consignments, and amounted to ten thousand dollars. The consignor did not claim to have any right to draw for more than three-fourths of the value of that particular shipment, and the draft was apparently intended to be drawn in pursuance of the agreement and the letter of credit. That such was the arrangement and understanding of the parties and such the nature of the transaction, would seem to have been well established by the evidence. On this state of facts, a jury would be well warranted in finding that the shipment had been made to cover advances and the general balance of account, and that the delivery to the carrier was a constructive delivery to the consignee, and vested in him a present lien and property in the goods consigned. It would be equivalent to a shipment and delivery to the carrier upon an order of the consignee for his own account; in which case, indeed, there would be, in general, a right of stoppage *in transitu* in the consignor, in case of the insolvency of the consignee, for the amount of the price, if not paid at any time before the goods came to hand; but in this case the shipment may be considered as paid for in advance, and in such case there can be no right of stoppage *in transitu*. (1 Pars. Merc. Law, 142.)

In general, the bill of lading alone vests in the consignee only a naked legal title, or a mere special property, the whole beneficial interest or general property remaining in the consignor; and in such case the consignee may maintain an action against a wrong-doer, or against the carrier if he fail to deliver the property according to the bill of lading, and he may transfer the property by an assignment of the bill of lading for a valuable consideration as the act of the consignor himself; but in the absence of any special agreement, arrangement, or implied understanding otherwise, he

has no actual property in the goods, nor any lien for expenses, or for a general balance of account, unconnected with the transaction, until the goods come into his actual possession. (Sto. Ag. §§ 361-378.)

The consignor, in such cases, may himself transfer the property by assignment or delivery of one of the bills of lading to any other person, as for instance to his banker, with whom he negotiates his draft against the shipment, and that will vest the property in the assignee, even though the consignee receive a second bill of lading and the goods from the carrier, and endeavor to hold them to cover a general balance of account against the consignor, while at the same time refusing to accept his bill, because he had exceeded his authority, and was already largely indebted to him; and such was the case of *Allen v. Williams* (11 Pick. 297); for, in that case, it was the manifest intention of the consignor that the shipment should not go to the consignee, unless he first accepted the bill. The delivery of the bill of lading and the goods by the carrier, being without authority, vested no title in the consignee, against an actual transfer of the property by the consignor himself, even though they had come into his possession; and accordingly, it was held that the matter of the previous dealings of the parties and the balance of account was wholly immaterial. The conduct and acts of the consignor were utterly inconsistent with any supposition or intent that the consignment was to go to his credit on the general balance of account, in pursuance of any previous arrangement. (Sto. Ag. § 378.) There is nothing of this kind here.

The consignor had never attempted to change the destination of the consignment, or to transfer the property to another; he sent the bill of lading and invoice directly to the consignee, and delivered the goods to the carrier, with the intent that they should go to him; the acceptance of the draft was in no way made or intended to be a condition precedent to the vesting of the property in the consignee, nor was there any thing in the transaction which was inconsis-

ent with the subsisting arrangement, or with the apparent understanding and intent that the property in the goods should vest in him, nor with the idea that the whole proceeds should go to his credit or general account, as well to cover the balance of account as that particular draft. He had authority to draw, at that time, to the extent of three-fourths of the value of the shipment then made; and if the draft were drawn in conformity with the authority given, it would create a binding obligation on the consignee to accept the same when presented; and if there had been an actual acceptance by virtue of the letter, there would be no longer any room to doubt that a constructive delivery and possession of the goods had taken place, and a clear lien or right of property vested in the consignee. (Davis v. Bradley, 28 Verm. 118; Holbrook v. Wright, 24 Wend. 169; Bryan v. Nix, 4 Mees. & W. 775; Russ. on Factors, 203.)

Where acceptances have actually been given upon the faith of a consignment by bill of lading, there can be no doubt that the consignee acquires such a lien, or property in the goods, as no subsequent act of the conveyance can divest; such an acceptance is held to be an advance upon the particular shipment.

Where there has been no advance or acceptance expressly made upon the particular consignment, and the question is only of a general balance of account for previous advances, the case differs not so much in principle as in the evidence required to establish the lien. It matters not whether the lien for a balance of account arises by operation of law from the usage of trade, or from the positive and special agreement and understanding of the parties, (Sto. Ag. § 375,) and it may extend to all sums for which a factor has become liable as surety or otherwise for his principal, whenever the suretiship has resulted from the nature of the agency, or the express arrangement of the parties, or it has been undertaken upon the footing of such a lien. (*Ibid.* § 376.) Whether or not the given consignment is to be considered as made to cover a general balance of account, will depend

upon the special arrangements, agreement, and understanding of the parties; but where such an arrangement exists, and the consignment is made in pursuance of it, and there is nothing else in the case which is inconsistent with the hypothesis, the case would be governed by the same principle. and a delivery to the carrier will be considered as a constructive delivery to the consignee. (Russ. on Factors, 203; Clark v. Mauran, 3 Pai. Ch. 373; Bryan v. Nix, 4 Mees. & W. 791; Desha v. Pope, 6 Ala. 690; 3 Pars. Cont. 261 & n. w.) In such case the shipment and delivery of the goods to the carrier, under the bill of lading, amounts to a specific appropriation of the property with an intention that it shall be a security or a payment to the consignee for the advances he has made.

In Ryberg v. Snell, (2 Wash. C. C. 403,) the consignor had parted with his interest in the property before it came to the possession of the consignee; there was no proof of any special arrangement or agreement, and a lien for a general balance of account was denied; but the principle was recognized, that if the consignment to the factor had been founded upon any special contract, which vested in him a legal title to the property, or if it had been made "in consideration of advances made, or arrangement entered into, on the faith of the consignment or the like," the case would have been different. It might be said that the advances here were not specially made upon the faith of this particular consignment, but they were made on the faith of this as of all future consignments which should be made in the regular course of their special business, and in pursuance of the arrangement which they had entered into concerning it; and so, it may very well be said, that the advances were made on the faith of this consignment among the rest. It was intended within the scope of the arrangement and fell under the implied contract, resulting from their course of business and the previous dealings between them. (Sto. Ag. § 355.) There was nothing in the conduct of the consignor which was inconsistent with this view of the mat-

ter. He had parted with all his right of property and with all claim upon the goods. He acted in pursuance of the previous arrangement and in accordance with it; and it may very well be inferred that such was his intention also, and that when he had forwarded the invoice and bill of lading and delivered the goods to the carrier, all claim of right or interest in them, on his part, had ceased. The attaching creditor stands in his shoes, and can have no greater right or title than he had at the date of the attachment.

The letter of credit contained these words: "You are at liberty at all times to value on us as against actual shipments to the extent of three-fourths of their value, at five to ten days' sight." The statute concerning bills of exchange provides (R. C. 1855, p. 293, § 3), that "an unconditional promise in writing to accept a bill before it is drawn, shall be deemed an actual acceptance in favor of any person to whom such written promise shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration." This language requires something more than a general letter of credit; it must be a promise to accept a bill, and the bill must be received on the faith of such written promise, to accept it. It is the established rule of law, that a written promise to accept a non-existing bill must point to the particular bill and describe it in terms not to be mistaken. (1 Pars. Bills, 293 & n. f.) The statute seems to have adopted this rule. This letter of credit amounted only to a general authority to draw bills for a given purpose, to indefinite amounts, and, on uncertain times, within a general limitation; it did not point to the particular bills, nor describe them in terms by which they could be identified. It did not amount to an "actual acceptance" of the bill in question.

It was so held in a like case upon a similar statute in New York, (*Ulster County Bank v. McFarlan*, 3 Denio, 553). Nevertheless, it was a promise to accept and pay bills drawn on him, which were to be negotiated by the drawer for his benefit, and it was evidently intended to be shown to the

persons to whom the bills so drawn were to be offered for negotiation, and to enable him to realize immediately upon them; and as the purchaser took the bill and advanced money on it, upon the faith of the letter, it is clear that he could maintain an action upon it against the promiser to recover the amount which he had advanced. (Sto. Bills, § 462; Russell v. Wiggin, 2 Sto. 213; Union Bank v. Costed, 3 Comst. 203; Larsdale v. Lafayette Bank, 18 Ohio, 126; Camyre v. Morrison, 2 Metc. 381; 2 Pars. Bills, 109.) It was therefore equally effectual upon this transaction as if it had amounted to an actual acceptance of the draft; for it created a liability against this consignee as for so much money allowed upon this very consignment. This alone would be sufficient to bring this case within that large class of cases, in which 'acceptances are considered as actual advances made upon the faith of particular consignments.

The amount paid upon the faith of this letter came clearly within the authority given by the letter of credit, and as the bill was never accepted, it becomes wholly immaterial whether it were drawn for an amount which exceeded the limit of the letter or not.

The evidence tended to show that Titus had practised some secret fraud in respect of the quantity of the coffee, and the valuation which he put upon it for the purpose of fixing the amount of his draft; but that did not change the character or effect of his consignment, nor does it affect the rights of the parties here. It was a general authority, and was to be taken most strongly against the giver of the power. It left the matter of the valuation to the agent; the banker could hardly be required to look beyond the letter of credit, the invoice and the bill of lading, and to reckon the expenses, fix the value, and weigh the coffee; and if a secret fraud were practised in these matters by the agent entrusted with such a power, it would seem that the principle ought to be applied, if it were at all necessary, that when one of two innocent persons must suffer, it should be the one

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who gave the power and assumed the responsibility of the trust and confidence reposed in his own agent.

In this view of the case, it is evident that the clause in the instruction given for the plaintiff which left it to the court, sitting as a jury, to say whether "the said bill of exchange was drawn in conformity to the authority contained in said letter," was wholly immaterial. It really made no difference whether the bill were drawn in conformity with that authority or not. Considered by itself, it was clearly erroneous, as referring a matter of law to the jury; but it is equally clear that the defendant suffered no prejudice by that error; and the verdict and judgment being for the right party, the case will not be reversed on that ground alone. (R. C. 1855, p. 1800, § 84; Gobin v. Hutchins, 15 Mo. 400; Johnson v. Armdall, 34 Mo. 388.)

In accordance with the views above stated, all the instructions which were asked for by the defendant were correctly refused.

The judgment will be affirmed. Judge Wagner concurs; Judge Lovelace not sitting.

STATE TO USE OF BRINKMEIER, Respondent, v. HENRY W.
WISSMARK *et al.*, Appellants.

1. *Practice—Instructions.*—If the instructions given correctly state the law of the case, the judgment will not be reversed because other instructions asserting the same propositions of law are refused.

Appeal from St. Louis Court of Common Pleas.

Kehr, for respondent.

Clover & Jecko, for appellants.

HOLMES, Judge, delivered the opinion of the court.

The only question presented here is, whether the instructions which were given for the plaintiff substantially contained the whole law of the case. We think they did, and that there was no error in refusing the second and third instruc-

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tions for the defendants, which alone is complained of. So far as they contained correct propositions of law, the same thing was embraced and even more correctly stated in the plaintiff's instructions. A judgment will not be reversed in such case. (Young v. White, 18 Mo. 93; Beal v. Cullum, 31 Mo. 258; Pallen v. McDowell, 31 Mo. 74.)

Judgment affirmed. Judge Wagner concurring; Judge Lovelace absent.



ELI M. BRUCE, Appellant, v. JOHN H. ANDREWS, Respondent.

Bailment—Factor—Lien.—Where, by the terms of the agreement between the factor and his consignor, the proceeds of the sale of goods consigned are to be remitted to the consignor, the factor has no property in the goods consigned by the bill of lading, as against an attaching creditor of the consignor, until the goods come into his actual possession. This case distinguished from that of Vallé et al. v. Cerré's Adm'r, ante p. 575.

Appeal from St. Louis Circuit Court.

Mumford, for appellant.

As a mere question between the consignor and consignee, the moment the whiskey was shipped and the bill of lading made out to Bruce, such property vested in him that it could not be attached by other creditors. (Haille v. Smith et als., 1 Bos. & Pul. 563; Clark v. Marcam, 3 Paige, Ch. 373.) There is nothing in the question attempted to be raised by the defendant's instructions as to a partnership between Bruce and Leach. (17 Mass. 197-204; 1 Binn. 106; 2 Bing. 20.)

Krum & Decker, for respondent.

I. The appellant (plaintiff below) failed to show in evidence that he at any time had possession of the property in question. A mere consignment of goods to a factor gives him no *lien* for advances on previous consignments until such goods actually arrive and come to the factor's posses-

sion. (Sto. Ag. 386; 1 Liver. 38-51; Bank of Rochester v. Jones, 4 Comst. 497; Winter v. Coit, 3 Seld. 288.)

II. The written agreement given in evidence by the plaintiff tends to show a *quasi* partnership between the plaintiff Leach and the witness Withers.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff replevied the goods out of the hands of the sheriff, who had seized them the day before under an attachment. They had been consigned by bill of lading to the plaintiff, a commission merchant at St. Louis, and were attached on board the steamer lying at the wharf at St. Louis, before any actual delivery to the consignee. The evidence for the plaintiff showed that the goods were owned by a partnership firm, at Warsaw, Ill., of which Samuel Leach, the consignor, was the principal member; that the plaintiff Bruce, in November, 1859, had advanced to Samuel Leach the sum of \$10,000, for which he had taken a note, secured on real and personal estate, the money to be applied, under a written contract, to the purchase of the mill and of grain and materials for the manufacture of whiskey; and that it was agreed that the whiskey, as it was manufactured, should be shipped and consigned to the plaintiff to be sold on commission, and the proceeds of every sale remitted to Leach at Warsaw, as soon as realized, with the condition that at the end of every six months the net profits of the mill should be credited on the \$10,000 note, and be so accounted for to said Bruce, if he should so elect; and the book-keeper of Leach was to render a balance sheet of the business, showing the net profits, at the end of every six months. There were various other stipulations which it is unnecessary to notice here. The goods were attached as the property of Leach.

It is plain that the plaintiff relied on the securities he had taken for the money loaned or advanced, and that there was no arrangement or agreement, whereby the plaintiff was to

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have a lien, or any property in the shipments of whiskey, before they should come into his possession, whether for a balance of account for previous advances, or for any advance or acceptance made on the faith of the particular consignment or of any future consignments. In this respect the case is widely distinguishable from that of *Vallé v. Cerré's Adm'r*, decided at the present term. By the express terms of the contract, the shipments of whiskey were to be sold on commission for account of the consignor, and the proceeds of each sale were to be remitted to the consignor, and it was only the net profits of the milling business that were to be credited on the plaintiff's note of \$10,000, upon a balance sheet rendered of such profits, every six months, if he should elect to have them so appropriated. Under this arrangement, there can be no pretence for saying, that the property in the goods vested in the consignee on delivery to the carrier; nor that he had any lien or property in them before actual delivery to himself. At the time when the goods were attached, he had only the naked legal title which was given by the bill of lading, the whole beneficial interest; a general property remained in the consignor, and as such it was clearly liable to attachment at the suit of his creditor.

No exceptions were saved in the bill of exceptions to any rulings of the court upon the evidence, or upon the instructions, and without such exceptions no points in them can be raised by a motion for a new trial; nor have we found any error in the record in these matters. Among the reasons assigned for the motion for a new trial, it is claimed that the verdict was against the law and the evidence, and that the justification set up by the defendant in his answer was unsupported by the evidence.

We do not see any ground for these objections. The verdict seems to have been well warranted by both law and evidence.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace absent.

JAMES H. MILLIKIN *et al.*, Plaintiffs in Error, *v.* AUGUST F. SHAPLEIGH *et al.*, Defendants in Error.

Agency—Bankers—Lien.—Where there is no mutual agreement or previous course of dealing between bankers whereby it is expressly or impliedly understood, that remittances of notes or bills when received or collected are to be placed to the credit of previous accounts, or when no advance is made or credit given upon the faith of the particular bills remitted, or of the usual course of dealing, the owner of the bill or note remitted for collection, through his banker, may sue for and recover the amount of said bill or note, although the collecting banker may have carried such amount to the credit of his correspondent in payment of a subsisting indebtedness.

Error to St. Louis Circuit Court.

The following instructions asked by the plaintiffs were refused:

1. If the jury find from the evidence that the plaintiffs were the owners of the acceptances in question, and endorsed and delivered them to Josiah Lee & Co., bankers in Baltimore for collection, for the plaintiffs' use, and that Josiah Lee & Co. transmitted said acceptances to the defendants for collection, and that defendants knew that Josiah Lee & Co. were not the owners of said acceptances, but were agents of the plaintiffs, then the jury shall find for the plaintiffs.

2. If the jury find from the evidence that the plaintiffs endorsed and then deposited the acceptances in question at the city of Baltimore, in the State of Maryland, with Josiah Lee & Co., bankers, for collection only; that said Josiah Lee & Co. endorsed said acceptances and transmitted the same to defendants at St. Louis, Mo., for collection, and that said acceptances were collected by the defendants; and if the jury find from the evidence that said Josiah Lee & Co. have never accounted for or paid to the plaintiffs the proceeds or amount of said acceptances, and that said J. Lee & Co. before or about the time said acceptances were paid to defendants became insolvent, and have ever since been and are now insolvent, so that the amount of said acceptances, or any part thereof, cannot be coerced or collected from said Josiah Lee

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& Co., then the defendants are liable in this action, unless they have shown in evidence, to the satisfaction of the jury, that credit was given by the defendants to said Josiah Lee & Co. on account of the said acceptances, or that the defendants have suffered balances in their favor to remain in the hands of the said Josiah Lee & Co. on the faith of the paper transmitted, or expected to be transmitted to defendants by Josiah Lee & Co., in the ordinary course of dealing between them.

And the following instruction asked by defendants was given:

1. If the jury find from the evidence in the cause that the defendants received the drafts in question from Josiah Lee & Co. for collection, and collected the same when due, and credited the proceeds immediately on a larger debt due from Lee & Co. to defendants, and said defendants informed said Lee & Co. that the said proceeds had been so applied, and all this was done without any notice to defendants of any interest of the plaintiffs in said paper, and no such notice was received by defendants till November, 1860, plaintiffs cannot recover.

Krum & Decker, for plaintiffs in error.

I. We insist that although the defendants may have been ignorant of the ownership of the paper, yet unless they suffered in some way, their right to the paper is not equal to the plaintiffs. They made no advances of money or credit on this paper; they suffered no balances to remain in the hands of Lee & Co. on the faith of this paper, or on the faith that this or any other paper would be sent them in the ordinary course of dealing. What rights have they against the *bona fide* real owner? None.

The plaintiffs being the actual owners of the drafts in question, can follow them or their proceeds into whosoever hands they may be, unless they were taken by defendants in good faith without notice of the true ownership, or that value was paid or credit given on account of the drafts. (Collins

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v. Martin, 1 Bos. & Pul. 648; Coddington v. Bay, 20 J. R. 643; Stalker v. McDonald, 6 Hill, 96; Am. Law Reg., Sept. 1862, p. 681, which contains an able review of the whole subject, with a collection of authorities; Hoffman v. Miller, 10 Am. Law. Reg. 676; Williams v. Little, 11 N. H.)

II. The question of fact, whether the defendants had notice that Lee & Co. held the drafts for collection only at the time when they transmitted them to defendants, should have been submitted to the jury; the court, however, excluded this question from the jury. This was error.

III. The defendants having received the drafts without consideration therefor moving from them, and under circumstances which plainly notified them that the drafts were transmitted for collection *only*, the question arises, can the defendants withhold the proceeds from the true owners by simply crediting the amount collected on their books to Lee & Co.? The entry of credit to Lee & Co. on the books of the defendants is not payment. (Butler v. Harrison, Cowp. 566; Gaillard v. Salem Bank, 9 Mass. 408; Clark v. Eby, 2 Sand. Ch. 169; Francis v. Joseph, 3 Edwds. Ch. 184.)

Glover & Shepley, for defendants in error.

I. The defendants being bankers, and receiving the notes from one of their customers and collecting the same without any knowledge or notice that the notes did not belong to the customer, have a lien upon the proceeds to secure a general balance due from the customer. (Davis v. Bowsher, 5 T. R. 488; Scott v. Franklin, 15 East. 428; Bank of Metropolis v. N. E. Bank, 1 How. 234; Rathbone, use, &c., v. Sanders, 9 Ind. 217; Wilson v. Smith, 3 How., U. S. 763.) The cases in 1 How., U. S. 234, and 9 Ind. 217, are on all-fours with the case at bar.

HOLMES, Judge, delivered the opinion of the court.

The plaintiffs endorsed and deposited two drafts with Josiah Lee & Co., bankers at Baltimore, for collection, who endorsed and sent them to the State Savings Association of St. Louis

for collection, as their agent. The last endorsements were expressed to be "for collection," but the defendants (who were trustees of the association) had no actual knowledge, at the time when they were received, that the plaintiffs were the owners of the drafts. The drafts were paid when due, the one on the 27th day of October and the other on the 1st day of November, 1860, and on the 29th day of October intervening Josiah Lee & Co. failed. On the 5th day of November following, the defendants received notice from the plaintiffs that they were the owners of the drafts, and that the same or the proceeds thereof were to be held subject to their order. When the drafts were received and collected, Josiah Lee & Co. were indebted to the State Savings Association in the sum of \$2,000, and the amounts of the drafts when collected were credited on that debt. Before the drafts were deposited by the plaintiffs with their bankers in Baltimore, the bankers and the defendants had had transactions together as bankers. No advances had been made, nor any credit given, on those particular drafts, and no paper had been sent by the defendants to the firm of Josiah Lee & Co. for collection. After the receipt of these drafts, the amounts collected on them were never paid or accounted for to Josiah Lee & Co. otherwise than by such credit on account of their indebtedness.

On this state of facts, the court instructed the jury, in effect, that the plaintiffs were not entitled to recover.

It may be taken as well settled that where there have been mutual and extensive dealings between two bankers, on a mutual account current between them, in which they mutually credit each other with the proceeds of all paper remitted for collection when received and charge all costs and expenses, and accounts are regularly transmitted from one to the other, and balances settled at stated times upon this understanding, and where, upon the face of the paper transmitted, it always appears to be the property of the respective banks, and to be remitted as such by each on its own account, and the balance of account is suffered to remain unsettled on the

faith of such mutual understanding, and a credit is given upon the paper thus remitted or deposited, or upon the faith of that which is expected to be remitted in the usual course of such dealings, there will be a lien for the general balance of accounts, and a right to retain the securities so received, or the amounts collected and on hand, as a credit upon the general balance in settlement of such advances. (*Bank of Metropolis v. N. Eng. Bank*, 1 How., U. S. 234; *Rathbone v. Sanders*, 9 Ind. 217.) But where there is no such mutual arrangement or previous course of dealing between the parties whereby it is expressly or impliedly understood that such remittances of paper are to go to the credit of the previous account when received and no advance is made nor any credit given on the basis of the particular bill, or upon the faith of such course of dealing and such future remittances, or where the special circumstances are inconsistent with the hypothesis of such mutual understanding, and the one bank merely passes the proceeds of paper remitted for collection to the credit of the other on a subsisting indebtedness which it happens at the time to have standing against the other, there is no such lien, and no right to retain and apply the money collected in that manner; but the real owner of the funds may maintain an action to recover the amount. (*Wilson v. Smith*, 3 How., U. S. 763.) And such, we think, was this case, on the proofs made.

The evidence did not show that there was any such mutual understanding or previous course of dealings as would justify the inference that these drafts were paid in to defendants as securities on account, or were remitted to be credited on account when received, or that the proceeds were to be placed to their credit in payment of previous advances or the general balance, or that a credit was extended on the balance of account on the faith of such remittances.

There was nothing in the transactions proved which was inconsistent with the right of Josiah Lee & Co. to draw immediately on them for the money collected on these drafts. And the fact that the drafts were expressly endorsed in full,

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"for collection," would seem to have a strong tendency to negative the idea that they were intended to be paid in on account of the general balance. No doubt a banker has a general lien by the law of the land, for his general balance, upon all securities in his hands belonging to his customer which have been paid in upon the general account or deposited as a security for advances on account, unless there be evidence to show that he received the particular bill or security under special circumstances which would take it out of the general rule. (*Davis v. Bowsher*, 5 T. R. 488.)

The evidence here fails to show that these drafts were either paid in as security or deposited upon the general account as a security for advances already made, or on a new credit given, but rather tends to prove that they were received under special circumstances which would of themselves import the contrary supposition.

Nor did the facts show any warrant or authority from Josiah Lee & Co. to them to make that application of the funds when collected. They were not even advised that the money had been so applied, nor that it was to be so accounted for. (*Hoffman v. Miller*, 10 Am. Law Reg. 676; *Bk. of Metropolis v. N. Eng. Bk.*, 6 How., U. S. 212.)

For these reasons, we think the plaintiffs' instructions should have been given and the defendants' instruction refused.

Judgment reversed and the cause remanded. Judge Wagner concurs; Judge Lovelace absent.



THE ST. LOUIS BUILDING and SAVINGS ASSOCIATION, Plaintiff
in Error, v. HENRY L. CLARK AND WIFE *et als.*, Defendants in Error.

1. *Securities—Substitution—Equity.*—P. & Co., at New Orleans, gave to C., at St. Louis, letters of credit authorizing him to draw bills of exchange from time to time upon them. As security for these advances to be thus made, C. gave to P. & Co. a deed of trust upon real estate, providing that if any part of the bills accepted by P. & Co., or thereafter to be accepted, should

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remain unpaid by C. on the 31st December, 1860, that the deed of trust might be foreclosed. This deed was recorded, and C. drew his bills and had them discounted. P. & Co. subsequently released part of the real estate covered by the deed of trust, and this release was also recorded, and the land conveyed as security for other parties. Upon a bill filed by the holders of the bills drawn by C., accepted by P. & Co.; and protested for non-payment, P. & Co. having become insolvent, to set aside such release, and to enforce the security in favor of the holder: *Held*, that by its terms the deed of trust was given to secure the balance only of such bills as P. & Co. might have paid for C.; that the bills were discounted upon the faith of the letters of credit, and that the holders thereof had no interest in the property released, more especially as against parties who had innocently acquired rights under the release. *Seemle*—That P. & Co., being the acceptors of the bills and the principal debtors, a suit might have been sustained against them by the holders of the bills, to have the security while in their hands assigned for the benefit of the creditors. *Held also*, That the recording of the deed of trust could not impart notice to subsequent creditors of any equitable rights in the holders of the bills, as it was not given for their benefit.

Error to St. Louis Court of Common Pleas.

Glover & Shepley, for plaintiff in error.

I. The deed of trust made by Henry L. Clark to Berthoud & Bernoudy operated to secure to the holders any drafts drawn and negotiated under the letters of credit mentioned in said deed of trust; for,

1. The bills drawn under and authorized under the letter of credit, were already issued at the time of the execution of said deed of trust, and secured by said instrument.

2. The bills held by said plaintiff are not new bills, discounted by them upon new letters of credit, but renewals of bills drawn under the letter of credit already subsisting at the time of the execution of the deed of trust.

3. No change of securities will release the title of the mortgagee so long as the original indebtedness or any portion thereof remains unpaid. (*Trip v. Vincent*, 3 Barb. Ch. 614; *Easton v. Friday*, 2 Rich. 427; *Handy v. Com. Bank*, 10 B. Mon. 98; *Smith v. Prince*, 14 Conn. 472; *Rogers v. Traders' Ins. Co.*, 6 Paige, 583; *Hubbards v. Converse*, 24 Verm., as quoted in 11 Am. Law Reg. 8.)

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II. The bills thus held by plaintiff being protected and secured by the deed of trust, neither the deed of trust nor any property described in it could be released without the assent of the plaintiff; for,

1. It is conclusively settled in this State that the transfer of a debt carries with it in equity the mortgage security, and that the holder of one of several notes so secured will acquire by the assignment to him an equitable interest in the mortgage. (*Anderson v. Baumgartner*, 27 Mo. 80, and cases cited in the decision and brief for respondents; *Crosby v. Brownson*, 2 Day, 425; *Stevenson et al. v. Block, Saxton*, 338; *Cullum v. Erwin*, 4 Ala. 452; *Cooper v. Ulman, Nolan*, Ch. 251.)

2. The plaintiffs, then, having an equitable interest in this deed of trust in the nature of a mortgage, it follows that their rights cannot be divested without some act of their own. (*Pratt v. Bank of Bennington*, 10 Ver. 293; *Trenton Banking Co. v. Woodruff*, 1 Green, Ch. 117.)

Lackland, Cline & Jamison, for defendants in error.

I. The court below did not err in finding for defendants, because,

1. The appellant purchased the bills on the credit and faith of the letter of credit alone. The drawer and acceptors were solvent at the time. The deed of trust was not delivered to the appellant, nor was it seen by the appellant or any of its officers or agents.

2. The deed of trust to Berthoud & Bernoudy, as trustees, did not secure the payment of said bills in the hands of any person or persons except said *Perdreauville Bros.*

II. The acts of the parties in selling and purchasing the bills were in pursuance of this construction of the deed of trust, and the appellant, as holder of the bill, could not legally have the real estate or any part thereof sold under the provisions of the deed of trust.

III. As the deed of trust only provides for a sale in the event the bills were unpaid and due to *Perdreauville Bros.*,

at least as to third persons without notice, they had the right to release and direct a deed of release.

IV. Murray advanced, *bona fide*, his money, and took the deed of trust to secure the payment of the same, and at that time the legal title was fully vested in Clark, clear and free of all liens and encumbrances. (1 Sto. Eq., § 64; Parks v. Jackson, 11 Wend. 482-66; Pratt et al. v. Bk. Bennington, 10 Ver. 293; Trenton Bk. v. Woodruff, 1 Green, Ch. 117; Horne et al. v. Graham, 21 Mo. 165; 1 Sto. Eq., §§ 108, 381, 434, 436.)

HOLMES, Judge, delivered the opinion of the court.

It appears that Henry L. Clark, of St. Louis, being desirous of negotiating bills to be endorsed by himself, and drawn upon the firm of Perdreauxville Bros., of New Orleans, procured from them their letters of credit, authorizing him to value on them in bills to be drawn and negotiated, from time to time, to the amount of twenty thousand dollars, and for renewals of the same within that limit, and undertaking to accept and pay such bills. The bills were drawn, negotiated and accepted; and in order to get this credit, or to indemnify them against loss on account of their acceptances already made or afterwards to be made under said letters of credit, Clark and wife executed a deed of trust conveying certain real estate, situated in the city of St. Louis, to trustees in trust for their benefit, and to secure the payment to them of whatever amount of such acceptances they should pay on his account. The plaintiffs became the holder of these bills by endorsement from Clark in the usual way of discount to the amount of \$6,000, on the faith of the letters of credit which were shown to them by Clark at the time. The deed of trust had been previously recorded. The bills were protested for non-payment, and the acceptors became insolvent. Clark also became insolvent, but in the meantime he had obtained a release and reconveyance of a part of the real estate conveyed by the deed of trust from Perdreauxville Bros. and their trustees to himself, which release

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was duly recorded, and afterwards executed other deeds of trust on the property so released to other parties, defendants here, to secure new loans obtained from them. The plaintiffs claim that the first deed of trust was given to secure the payment of the bills, as such, to the holders thereof; that when the bills were negotiated to them, the endorsement and assignment of the bills secured carried also an interest in the deed of trust, as a mortgage security made for their benefit; that the release of a part of the property conveyed by the deed of trust by Perdreauxville Bros. and their trustees at the instance of Clark, the grantor, without their knowledge or consent, and before the bills held by them had been paid, was a fraud upon their rights, and that the defendants claiming under the other and later deeds of trust were charged with notice of their prior mortgage; and they pray that these deeds and the release may be declared void, and that the real estate in question may be decreed to be sold for their benefit.

The petition proceeds upon a manifestly erroneous construction of this deed of trust, and upon an entirely mistaken view of the essential nature and character of the transaction. The deed conveys the property to trustees for the benefit of the two Perdreauxvilles by name, as the sole beneficiaries therein. It recites that letters of credit have already been given to Clark to that amount, in virtue of which bills have from time to time been drawn, and that further letters of credit are intended to be given to authorize him to draw other bills in renewal of those already drawn, and provides that if on the thirty-first day of December, 1860, said Clark shall have fully paid "the amount of each and all the bills" so drawn in virtue of the letters of credit, then the deed shall be void. Perdreauxville Bros. were the acceptors and payers of the bills; they had already accepted some and expected to accept others, apparently for the accommodation of the drawer; they take this security for whatever amount may remain unpaid and due to themselves on a certain day; they were to be reimbursed the amount they should so have to pay as acceptors of their bills. And accordingly the deed

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of trust appears to have been intended merely to indemnify them against loss on the credit they had given to the drawer, and to secure the repayment to them of the amount which they should so pay. This is all. Neither the payee nor holder, nor any other party to the bills as instruments are secured at all, nor named in any way as beneficiaries. The bills were evidently negotiated upon the personal credit of the parties to the instruments, and upon the faith of the letters of credit, which were merely promises to accept. They fulfil that undertaking, and actually accept the bills. The purchasers could have no other reliance or security than the parties to the bills. If the acceptors took security for their indemnity, that did not directly concern the plaintiffs, nor make them in any way an immediate party in interest in that transaction, and can matter little whether they knew of the deed of trust or not. It was recorded and open to all the world and they may have seen it. It is to be presumed that they took the bills on the faith of the letters of credit, and on the credit of the acceptors and of the drawer, and they may very well have the more readily relied upon the acceptors, if they knew that the drawer had provided them with funds to meet the bills.

The deed of trust further provided that "if the said bills already drawn or hereafter to be drawn upon said Perdreauxville Bros. by said Clark, or either of said bills, or any part of them shall remain unpaid and due to said Perdreauxville Bros. on the 31st day of December, 1860, that this deed shall remain in force," and the trustees shall proceed to sell. This language is somewhat loose and inartificial, but when considered with reference to the other clauses, and the nature and object of the whole instrument, it becomes apparent that the real meaning is that if the amount which the acceptors shall have paid on account of their acceptances as the payers of the bills shall then still remain unpaid and due to them, and shall not have been repaid to them by Clark, in accordance with the purpose and the trust expressed in the deed as before provided, as a security for such indemnifica-

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tion, then the trustees are to sell for their benefit, and pay over to them (not to the holders of the bills) "the amount which may then remain unpaid upon each and all of said bills," so drawn as aforesaid, "under said letter or letters of credit." The bills and the letters are evidently referred to merely for the purpose of ascertaining and defining what indebtedness it is that is intended to be secured to the Perdreauvilles, and on what account it accrued. There is nothing in the instrument which by any reasonable construction can be made to mean that the bills are secured as such for the benefit of the holders, or any other parties to them as such. They are not described in the deed so as to be singly indemnifiable, nor mentioned otherwise than as bills drawn or to be drawn in virtue of the letter of credit. The Perdreauvilles are secured as for so much money advanced and paid to the use of the grantor in the deed in pursuance of the arrangement by which the credit was obtained. Such being the deed of trust, and such the nature of the whole transaction, it is manifest that the doctrine of an assignment of a note or debt secured by a mortgage, being also an assignment so far of the mortgage security (to which many authorities have been cited), can have no proper application to the case.

It is not a security given to the holder, nor to any party under whom he holds the bills; nor does it amount to any kind of guaranty of payment to them, nor to any promise or undertaking on the part of the drawer or acceptors to any person who might upon the faith of such undertaking become the holder by purchase, discount, or otherwise, to pay the same to such holder, if not duly paid by the acceptors at maturity. (Sto. Bills, § 458, No. 1; McLaren v. Watson, 26 Wend. 425.) Such a guarantee by Clark would have been no more available to the plaintiffs than his signature as drawer or endorser.

Again, suppose the drawer had actually deposited funds with the acceptors to the amount of bills drawn, and had obtained on that their letters of credit, and the plaintiff on being informed of the fact and seeing the letters had taken the

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bills, and then the acceptors had become insolvent after acceptance and before payment, it is clear the funds would have been lost to both the drawer and the holder. Instead of placing funds in the hands of the acceptors, the drawer obtains a credit and gives a security. The acceptors pay until they become insolvent and can pay no more. The drawer withdraws his security. It is the same thing as a withdrawal of funds from the hands of an insolvent acceptor. To the extent of the acceptance unpaid, the deed of trust ceases to have any object or purpose. It was a security for an anticipated indebtedness which has never come to exist. A party who receives an indemnity can have no claim until he has been damnified.

There is another view of the matter which might seem to deserve some notice. The drawer who gets the money and is the party ultimately liable, is the principal debtor. The acceptors may be considered as in reality his sureties, being merely accommodation acceptors, and they take this security for their indemnity. In equity the doctrine seems to be established, that if a principal has given any securities or pledges to his surety, the creditor is entitled to the benefit of them in the hands of the surety, to be applied in payment of his debt. (1 Sto. Eq. Jur., § 638; Burge on Sur., 324.) In *Munro v. Harrison*, (1 Eq. Cas., Abr. 83,) it is said that a creditor shall, in a court of equity, have the benefit of all counter bonds or collateral security given by the principal to the surety, "as, if A. owes B. money, and he and C. are bound for it, and A. gives C. a mortgage or bond to indemnify him, B. (the creditor) shall have the benefit of it to recover his debt." And if this security was still subsisting alone in the hands of these acceptors, and this suit had been a petition against them and the drawer to have the deed of trust or the interest of the beneficiaries in it, after their insolvency, assigned to the plaintiff as a security given to a surety for the drawer for the debt owing by him to the plaintiff, we should be inclined to think the plaintiff would have been entitled to such a decree as between those parties. But the

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case now stands here in a very different attitude. The Perdreauvilles were liable on their acceptances, though insolvent, and their release of the security under such circumstances, without having paid the bills, might well be decreed a fraud upon this equitable right of the creditor. But there was no such suit while the security remained in their hands. It was actually given up and released by a deed recorded before the other creditors, defendants here, loaned their money on this same real estate, taking deeds of trust without any notice of such fraud. Indeed, the right which the plaintiffs may have had in respect of this security, while it subsisted in the hands of the surety, was no more than a right to maintain a suit in equity to have that security assigned for their benefit. It was certainly not any direct interest in the deed of trust itself as a party to the instrument; and the deed of trust having been released, the mere fact that it had been duly recorded could not impart any notice to their subsequent creditors of any such equitable right, and the security itself had been extinguished. There is nothing in the release which could amount to such notice, nor was there any sufficient evidence to charge them with notice of the fraud. In respect of the equities, therefore, they stand in a better position than that of the plaintiffs. This ground of release was not specially urged by counsel, but they rested their claim mainly, if not entirely, on the ground that the deed of trust was itself a mortgage security for the payment of the bills, as such, and for the direct benefit of the holders, and that as such a mortgage it imparted notice to defendants of their rights in the security. Our conclusion is that the plaintiff was not entitled to recover on either ground.

Exception was taken by the plaintiff to the admission of the testimony of Henry L. Clark, on behalf of his co-defendant, Murray. The statute expressly provides that a party may be a witness for a co-defendant in any matter in which he is not jointly interested, or liable with such other party, and as to whom a separate verdict can be rendered. (Laws of 1856-7, p. 181.) We do not see that there was any such

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joint interest or liability on his part as would necessarily exclude him ; nor, in the view we have taken of the case, was the testimony which he gave at all important, or material to the merits of the case.

The same may be said of the testimony of the witness Bogy, to which an exception was taken. There was no ground here for reversing the judgment.

Judgment affirmed. Judge Wagner concurs ; Judge Lovelace absent.

GEORGE A. CHRISTMAN *et al.*, Plaintiffs in Error, v. AURORA CHARLEVILLE *et al.*, Defendants in Error.

Mechanic's Lien—St. Louis County—The right of an original contractor with the owner of a building, under the special act relating to St. Louis county, (Sess. Acts 1848, p. 88,) to file his lien within six months after the completion of the contract, was not taken away by the act R. C. 1855, p. 1071.

Error to St. Louis Land Court.

Garesché & Farish, for plaintiffs in error.

I. The lien law specially applicable to St. Louis county was not repealed by the Rev. Code of 1845. (§ 29, p. 699, R. C. 1845.)

II. It continued in force until 1st May, 1856. (§ 26, p. 1071, R. C. 1855 ; § 18, p. 1026, *ibid.*)

III. Sec. 26 (p. 1071, R. C. 1855), which repeals it, and the special act for St. Louis county expressly provides that " nothing herein shall in any manner impair, injure or prejudice any right, title or interest of any person or persons acquired under both or either of said acts." The ruling of the Land Court conflicts with this by its decision, that, because the lien was not filed within the shortened term of ninety days, as required by the new law, it was invalid.

IV. The reservation of this proviso would be of force even without express statute, otherwise the statute would be

retroactive, and the Legislature would impair an executed contract, by the destruction of the lien under which it was fulfilled. (§ 10 of U. S. Const., p. 25-6, R. C. of 1855; § 17 of Const. Mo., p. 85, *ibid*; Houser v. Hoffman, 82 Mo. 340; Dwar. on Stat., § 681; Paddleford v. Dunn, 14 Mo. p. 522; Ridgley v. St. bt. Reindeer, 27 Mo. 442.)

M. L. Gray, for defendants in error.

On the 11th December, 1855, the law was changed to take effect on the 1st of May, 1856, but plaintiffs did not file their lien until May 8, 1856, after the new law took effect; then their remedy would have been controlled by the law of 1843; but as they choose to wait from 5th November, 1855, to 3d May 1856, until the new law enacted December 11, 1855, had gone into operation, their remedy is to be controlled by the law then in force. The law of 11th December, 1855, shows and is notice to all concerned (see § 6, p. 1067, R. C. 1855) that liens must be filed within 90 days.

If plaintiffs had been cut off from their remedy within 90 days from the passage of the law of 11th December, 1855, then they might have ground of complaint, and then the cases cited by appellants would be in point.

Appellants had their 90 days, &c., nearly twice over, from 11th December, 1855, to the time of passage of the new law changing the remedy. Therefore, 14 Mo. 522; 27 Mo. 442, and 32 Mo. 340, are not authorities for appellants but for appellees, and I rely on them to sustain the court's instruction. (See also, Sedgwick on Stat. & Const. L., pp. 659, 691 and following; Call v. Hogger, 8 Mass. 429; Holyoke v. Haskins, 5 Pick. 26; Smith v. Morrison, 22 Pick. 431.)

The case of Smith v. Morrison, 22 Pick. 432, and Houser v. Hoffman, 82 Mo. 340, both decide the very point in issue here for the appellees.

HOLMES, Judge, delivered the opinion of the court.

The plaintiffs, as original contractors for work and materials in the building of a house, completed their contract on

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the fifth day of November, 1855, filed their mechanics' lien on the third day of May, 1856, and brought their suit in June thereafter. All this was done within the time limited by the statute concerning mechanics' liens, in St. Louis county, which was in force until the first day of May, 1856, when the revised statute of 1855 took effect. The 25th section of the act of 1855 concerning mechanics' liens, (R. C. 1855, p. 1071,) which repealed the previous act of 1843, applicable to St. Louis county, that of 1845 having been repealed by effect of the revision, expressly provided that "nothing herein shall in any manner impair, injure or prejudice any right, title or interest of any person or persons" acquired under the said act of 1843. This act required that the lien of a contractor should be filed within six months after the completion of the work or contract, and that suit should be brought upon the lien within ninety days after the lien was filed. The act of 1855 required the lien to be filed within ninety days after the completion of the work or contract, and the suit to be brought upon the lien within nine months after the filing of the same.

On the trial the plaintiffs proved the facts stated in their petition, and the court declared the law to be, "That a party furnishing materials for a building on the 5th day of November, 1855, or prior to the 11th of December, 1855, but who only filed his lien therefor on the 3d day of May, 1856, is not within the time prescribed by law."

The question is whether the plaintiffs had acquired any such "right, title or interest" under the act of 1843, as was intended to be saved by the 25th section of the act of 1855. Not having filed their lien before the first day of May, it is clear that they had not acquired a lien under the previous act while it was in force.

But this language of the saving clause is broad enough to cover something more than a lien completed by an actual filing of the demand. It includes any right acquired. The plaintiffs had certainly gained a right to file a lien within six months. They may be presumed to have had knowledge

of the passage of the act of 1855, and that it would take effect on the first day of May, 1856; but the question still remains whether they were not justified in assuming that their right to file a lien within six months was saved and excepted by the act itself. They had done the work and furnished the materials under a law which gave them the security of a lien on the property, as well as a special remedy to enforce it. It was held in *Hauser v. Hoffmann*, (32 Mo. 334,) that this special remedy might be changed at the will of the Legislature. Here is something more than a peculiar remedy; there is a positive right to the security of a lien.

This right was acquired under the act, and it was to continue for six months. To take away the whole time would be to destroy the right; and to take away a part of the time would certainly be to "impair, injure, or prejudice" that right. The suit was brought within the time limited for bringing the action, under either act.

We think the right of the parties to file their lien within six months was saved to them by the clause in question.

Judgment reversed and remanded. Judge Wagner concurs; Judge Lovelace absent.

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1. *Mechanics' Lien—Credits.*—Where a party filing a mechanic's lien under the statute applicable to St. Louis county, of February 14, 1857, omits to give the credit for payments made, he cannot enforce his lien upon the property of the owner of the building.

Appeal from St. Louis Land Court.

C. D. Drake, for appellants.

The plaintiffs having filed a lien for a greater sum than that due them after all just credits given, have thereby lost the right to enforce any lien against the defendants' property. (*Thatcher v. Powell*, 6 Wheaton, 119; *McCay's Appeal*, 37 Penn. Stat. 125; *Edgar v. Salisbury*, 17 Mo. 271.)

A. Hamilton with Van Waggoner, for respondents.

I. The statute establishes a privity and liability between the sub-contractor and the owner of the property. (23 Mo. 111; *White v. Miller*, 6 Harris, 54, and 31 Vt. 221.)

II. The mere mistake in the amount, which was corrected on the trial, did not vitiate the whole claim. The law will be construed liberally in favor of the mechanic and material-man. According to the notion of the defendant Hynes, a mere error in the addition or in the computation of interest, or a mistake as to a disputed item of credit or payment—in fact, a verdict or lien filed in any case for less than the amount due, would defeat the entire demand. (10 Ohio, 158-9.)

WAGNER, Judge, delivered the opinion of the court.

There is but one question in this case which it is deemed necessary to notice, and that is, whether the failure on the part of the plaintiffs to give all the just credits to which the defendants were entitled when the demand was filled, worked a forfeiture of the lien. The account filed, for which a lien was asked, was for the sum of \$1,771.14, and it was admitted that before the filing of the same the sum of \$160 had been paid thereon, which had been neglected to be credited.

By an act entitled "An act for the better security of mechanics and others erecting buildings or furnishing materials for the same in the county of St. Louis," approved February 14, 1857, (Sess. Acts 1857, p. 668,) it is provided as follows: "§ 3. And it shall be the duty of every original contractor, within six months, and every journeyman and day laborer, within thirty days, and of every other person seeking to obtain the benefit of this act, within four months after the indebtedness shall have accrued, to file with the clerk of the St. Louis Land Court a just and true account of the demand due him or them, after all just credits have been given, which is to be a lien upon such building or other improvements, and a true description of the property or so near as to identify the same upon which the lien is intended to apply,

with the name of the owner or contractor, or both, if known to the person filing the lien, which shall in all cases be verified by the oath of himself or some credible person for him."

It will be seen that the account or statement of demand required to be filed in order to secure a lien, under the act, must contain three things: first, a just and true account, after all credits have been given; second, a true description of the property on which the lien is intended to apply; and third, the name of the owner or contractor, or both, if known to the person filing the lien, and it must also be verified by oath. We need not inquire why the Legislature required such a statement to be made and filed as a prerequisite to a lien, though good and sufficient reasons for its propriety readily suggest themselves.

The lien, when filed in accordance with law, operates as an encumbrance. It may be of great and essential moment to the owner of the property to know the exact amount for which it is encumbered.

The mechanic or material-man who claims the lien may omit to give the proper credit, as well for a large as a small amount. The party owning the property may be desirous of selling. A purchaser might be found perfectly willing to buy with a certain amount existing against it as a lien, but not if it was encumbered greatly in excess over that amount. Protracted litigation may ensue on an attempt to prosecute the lien to final judgment, and the owner be deprived of the market value of his property for an indefinite period, on account of the failure to comply with the statute in giving the just credits. But the right of a mechanic or material-man to a lien on a building which his labor or materials have contributed to erect, nowhere exists at common law. It is purely of statutory creation. It is an extraordinary remedy, and he who seeks to avail himself of it must strictly comply with its conditions. The statute points out a certain mode and manner of proceeding, and if that mode and manner is not pursued the remedy does not exist.

It is required that all just credits shall be given to the ac-

counts; that the property shall be accurately described so that it can be identified in applying the lien, and that the name of the owner or contractor, or both, if known, shall be inserted. These all taken together, make up the constituent or component parts necessary to give validity to the lien. And we are no more authorized to say that any one of these constituents can be dispensed with or omitted than another.

In Ohio, it has been decided that the fact that the amount due was less than that contained in the statement filed did not defeat the lien. (Thomas v. Huesman, 10 Ohio, 152.) But this adjudication was made on a statute wholly different from ours. It required only "that any person entitled to a lien under this act shall make an account in writing of the items of labor, skill, material and machinery furnished, or either of them, as the case may be, and after making oath thereto within four months from the time of performing such labor and skill, or furnishing such material and machinery, shall file the same in the recorder's office," &c. Nothing is said about giving credits, as in the law under consideration; besides, that was not an omission to give a credit, for it does not appear that any payment had been made, but a miscalculation in computing the amount of measurement in some carpenters' work. Being founded on a statute entirely different, and the facts of the two cases being wholly dissimilar, it cannot be regarded as authority here.

The judgment is reversed and the cause remanded. Judge Holmes concurs; Judge Lovelace absent.

Hamilton, for respondents, filed a motion for rehearing, citing Underwood v. Walcott, 3 Allen, Mass. 464; 10 Metc., Mass. 12, & Heamann v. Porter et als., 35 Mo. 137.)

Opinion of the Court (by WAGNER, J.)

The counsel for the respondents have filed a motion for a rehearing in this cause, and have referred us to the case of Heamann v. Porter et als., (35 Mo. 137,) which was not

published when the opinion was written. As the opinion in that case is apparently inconsistent with the one delivered by us, we have been led to re-examine the question, and consult such authorities as we could find bearing on it.

It does not appear from the report of the case of Heamann v. Porter et als. whether the informality in the account arose from a failure to give the just credits, or from an excess charged in the furnishing of materials. Both were set up in the answer in defense, and as the jury in their verdict simply reduced the amount claimed, we are unable to say on which cause their finding was predicated, though the opinion of the court certainly goes to the extent of holding that the lien is not divested by reason of the lienholder making out his account for more than what is due, or by reason of his failing to give credit for what he has received in payment.

We have not held that a mistake in the price of labor, or in the value charged for materials, about which there might be a difference of opinion, requiring evidence to ascertain the true facts, would defeat the lien; but we have decided that receiving part payment and neglecting to credit it on the account, was such a failure to comply with the law as effected that result. So far as the property holder is concerned, the proceeding is strictly *in invitum*; the subcontractor or material-man subjects his property to an encumbrance or burden without any contract with him; it is a special and extraordinary remedy or privilege given by the law; and nothing, we presume, is better settled than that one attempting to avail himself of the advantages of a remedy or privilege of this character, must fully comply with the provisions of the law conferring it.

In Massachusetts, under a statute similar to ours, it has been decided that a lien for labor performed in erecting a house upon the land of another, is not dissolved by an overstatement of the amount due for such labor, if such overstatement was not made wilfully and knowingly. It seemed that the amount of the bill of particulars filed was for \$286.11, while the amount claimed in a proceeding to fore-

close the lien was only \$259.21, and no credits were given: the court disposed of the case, merely remarking that a jury had found under proper instructions that the petitioners did not wilfully and knowingly claim more than was due them, and therefore they would not say the petition could not be maintained. (*Underwood v. Walcott*, 8 Allen, 464.)

The Pennsylvania statute requires *inter alia* that the mechanic or material-man, in filing a lien on a building for labor or materials expended in its construction, shall set forth in his statement, among other things, the name of the contractor, architect or builder, when the contract for the complainant was made with such contractor, architect or builder. McCay contracted to do work with Thompson, the contractor for the erection of a building, which was owned by one Scott; in filing his lien he mentioned the name of Scott, the owner, and omitted that of Thompson, the contractor, and the Supreme Court unanimously held that the defect was fatal and defeated the lien. And Judge Strong, in delivering the opinion of the court, uses the emphatic language, "why the Legislature required such a statement, it is not important to inquire. It may have been for the purpose of insuring a description of the property upon which the claim might be made, or it may have been to direct the owner to the person who could inform him of the justice or injustice of the demand. Whatever the reason may have been, the requirement is as positive and unequivocal as any other which the statute makes. * * * He whose labor has cleared the grounds of another, removed rocks, excavated the ditches, and built the fences, has no lien, though his labor has greatly increased the value of the land upon which it has been expended. To the mechanic, however, the Legislature has given peculiar privileges which are not of common right. Yet they are privileges *sub modo*. They can only be asserted in the manner provided by statute. If mention of the name of the contractor in the claim filed is required as one of the considerations upon which the lien is given, the reason why such a condition is imposed cannot be

material. It is only in certain cases that it is given at all, and where the condition are not complied with, the case does not exist." (McOay's Appeal, 37 Penn. Stat. 127.)

So in New York, where the law prescribes that the notice of claim filed must state the name of the owner against whom the lien is sought to be acquired, it is held this is matter of substance—an essential pre-requisite to the creation of the lien; and per Woodruff, J., "it is therefore indispensable to the creation of the lien that the prescribed notice be filed. The sixth section, in which the notice to be filed is particularly and minutely described, provides that it shall be in writing; that it shall specify the amount of the claim; the person against whom the claim is made; the name of the owner of the building; and the situation of the building by the street and number, if the number be known. These particulars are all material; they are matters of substance," &c. (Beals v. Cong. &c., 1 E. D. Smith, 654.) In Roberts v. Fowler, (3 E. D. Smith, 632,) it is declared the remedies created in the mechanics' lien law are of purely statutory and extraordinary nature, and the provisions for their enforcement must be strictly construed. And in Conklin v. Wood, (3 *ibid.* 662,) where the law required the notice to create a lien should be verified in the same manner as a pleading under the code of procedure, it was held that an affidavit subscribed to the notice, alleging that the statement of the balance due as therein set forth, was true according to the deponent's knowledge, was not sufficient, but was a fatal defect—defeated the lien and was not amendable.

Now the law under consideration requires that the statement filed shall include a true account, with all just credits given; a description of the property, so that it can be identified, with the name of the owner or contractor, or both if known, and that it shall be verified by affidavit.

These all constitute the elements essential to securing the lien. We cannot say that one of the constituent parts is more matter of substance than another. The language

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seems plain and unambiguous, and we are not permitted to impair its force or fritter away its meaning by construction.

The motion for rehearing is overruled. Judge Holmes concurs; Judge Lovelace absent.

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50a 612

LEVI B. CLARK, Respondent, v. MARTIN HAMMERLE, Appellant.

1. *Lands and Land Titles—Confirmation—Evidence.*—Certified copies from the registry of claims proved before the Recorder of land titles under the act of Congress of May 28, 1824, or from the registry of certificates of confirmation or list of claims are proved, or of official survey by the Surveyor General of the lots so proved, or a certificate of confirmation issued by the Recorder of land titles upon such survey, are admissible in evidence as *prima facie* evidence of title to the lot confirmed.
2. *Confirmation—Survey.*—A lot was claimed and confirmed by the Recorder of land titles, as a lot of one and a half arpens in front "by about thirty arpens in depth," bounded north by Guion, south by Tabeau, east by Aug. Chouteau's mill tract, and west by Charles Gratiot. The lot was officially surveyed in accordance with the calls for boundaries, rejecting the call for quantity of "about thirty arpens in depth." *Held*—That this was the correct mode of surveying the lot proved, and that the certificate of confirmation issued properly conformed to the official survey so made.
3. *Ejectment—New Madrid Location.*—A defendant claiming title under a New Madrid location is in a position to dispute the correctness and validity of a *prima facie* superior title of the plaintiff under a confirmation by the act of June 13, 1812.
4. *Land Titles—Abandonment.*—The Spanish law of abandonment continued in force in this State until A. D. 1816. To constitute an abandonment, there must be a departure of the owner, corporeally, from the land, with the intention that it shall be no longer his. The intention to abandon may be inferred from facts and circumstances. Ceasing to cultivate, mere inaction, removal to another place, is not enough without some act of disclaimer, or act showing an intention to disclaim ownership.

Appeal from St. Louis Land Court.

This case was before the court in 27 Mo. 55. On the trial of the case below, the plaintiff gave in evidence:

"1. Copy of registry of claim from Hunt's Minutes, page 116, in the name of 'Joachim's Roy's legal representatives,'"

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for a lot in *cul de sac* of one and a half arpens 'by about thirty in depth,' bounded north by Guion, south by Tabeau, east by Auguste Chouteau's mill tract, and west by Charles Gratiot.

"2. Copy of registry of certificate of confirmation, dated July 30, 1825, in favor of 'Joachim Roy's' legal representatives, for common field lot in *cul de sac*, of one and a half arpens 'by about thirty deep,' by virtue of

"3. A will of Joachim Roy, March 28, 1789, devising all of his estate to Veronique Guitard, and copy of the same.

"4. United States private survey No. 3307, for Joachim Roy's legal representatives under the above claim and registry of confirmation, and which covered the premises in dispute.

"5. Certificate of burial of said Roy, June 25, 1801.

"6. Certificate of burial of V. Guitard, December 8, 1808.

"7. Will of V. Guitard, August 19, 1808, whereby, after devising some personal property to others, she ordains that 'the remainder of the properties that she shall leave after her death shall be equally divided between her two other children, François Cayoux and Eustache Cayoux, the said children to enjoy the same.'

"8. Deed of said François and Eustache Cayoux to William Carr Lane, August 1, 1825, for said lot.

"9. The defendant admitted that Veronique Guitard first married one Cayoux and had four children by that marriage, viz., Francis, Eustache, Louis, and Josette; that said Cayoux died, and his widow married Joachim Roy; that said Roy died, leaving his widow, but no children by her; that all the title held by Lane was vested in the plaintiff, and that defendant was in possession of the premises at the time alleged.

"10. A certificate of confirmation issued March 24, 1857, by Renard, Recorder of land titles, under the claim of Roy's representatives, as above set forth, and being in favor of said representatives."—This was objected to as incompetent; it was after the suit was commenced, and it was issued without authority. Objections overruled and exceptions taken.

The appellant (defendant below) gave the following evidence:

"1. Letter of William Carr Lane to 'Gen. Milburn, Surveyor,' &c., dated June 20, 1840, and while Lane was owner of the title now held by plaintiff. In this letter he says, 'I assert of my *own certain knowledge*, that the proof taken before the Recorder—No. 2, page 116—called for 40 *arpents*, instead of about *thirty*, before *the record was altered*. I have now in my possession two copies of these entries upon the Recorder's Minutes, made *before the erasure of the claimant's name and the word forty, and of the subsequent interlineations of another name and of the word thirty*.' He refers frequently to pages 49 & 50 to prove that the lot was forty arpens deep, and asserts that the positive testimony on these pages ought not to be overruled by the '*questionable testimony* at p. 116.' The underscoring is from the original letter.

"2. The claim of Joachim Roy's legal representatives for a lot containing one arpent and a half by about forty in depth, bounded north by the field lot formerly owned by Madame Lecompte, east by the claim of widow Camp's legal representatives, south by a field lot formerly owned by Tabeau, and west by land unknown, near to Gratiot's. (From Hunt's Minutes, p. 49.)

"3. Registry of certificate of confirmation, dated July 30, 1825, in favor of Joachim Roy's representatives, for a lot of one and a half arpens front by about thirty deep, bounded north by Guion's legal representatives, south by Tabeau's legal representatives, east by Auguste Chouteau's mill tract, west by claim of Charles Gratiot."

These two documents the court admitted.

"4. The same claim and certificate, with the depositions of Francis Cayoux and Eustache Cayoux thereto annexed, as follows:

" 'Francis Cayoux, being duly sworn, says that he knows the field lot claimed, and that this deponent, forty years ago, with Joachim Roy, cultivated this field lot, and continued to cultivate the same with said Roy until the fence was taken

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down about twenty-five or twenty-six years ago. This deponent says that his mother, after the death of his father, married Joachim Roy, and in that way living with Roy he became acquainted with this field lot. He has no interest in this claim whatever.

his
FRANCIS CAYOUX.
mark.

'Sworn to before me, July 7, 1825.

'Theodore Hunt, Recorder L. T.'

"Eustache Cayoux, being duly sworn, says that he knows the field lot claimed, and that upwards of thirty years this lot was owned and cultivated by Joachim Roy, who cultivated the same until the fence was taken down; and this deponent further says he has no interest whatever in the field lot, neither directly nor indirectly.

his
EUSTACHE CAYOUX.
mark.

'Sworn to before me, July 7, 1825.

'Theodore Hunt, Recorder L. T.'

"(See Hunt's Minutes, pp. 49-50.)"

The plaintiff objected to the admission of the depositions as incompetent, and the court sustained the objections and excluded the same, to which the defendant excepted.

"5. The claim and certificate of confirmation of A. Guion's legal representatives for a lot in the *cul de sac*, dated July 30, 1825, calling for "cadet Jean Rion" as its southern boundary.

"6. Claim and registry of confirmation of Tabeau's legal representatives, dated 10th August, 1825, in same common field, calling for lot 'claimed by Jean Rion's legal representatives' as its northern boundary.

"7. Concession to Cottard of one by forty arpens, taken from (i. e. commencing at) '*trail carré*,' meaning the west line of the common field fence and in *cul de sac*.

"8. Survey of same showing that this concession to Cottard was wholly east of the premises in dispute.

"9. Claim of widow Camp and confirmation by the old Board. This claim is north of Chouteau's mill tract. The

premises in dispute only touch the S.W. corner of the mill tract.

"10. Plat of Chouteau's mill tract in 1803, showing that it was bounded on the west by '*vacant lands*.'

"11. Admission of counsel that New Madrid certificate was located so as to cover the premises in dispute in 1818, surveyed by the United States and patent certificate issued, and that this title is vested in defendant.

"12. Adolph Renard, Recorder of land titles, testified that he had been in the Recorder's office since 1836, and had been Recorder since 1847; that the annotation on Guion's claim 'in Chouteau mill tract,' was in the handwriting of Hunt; he believed the entries on pp. 49 and 116 of Hunt's Minutes in regard to the Roy claim, and mutually referring to each other as one and the same claim, were also in Hunt's handwriting."

The defendant then offered to prove by him that these annotations had always, since he had been Recorder, been treated by him in his office as a part of the record, and were so considered.

The court, on plaintiff's objection, excluded this testimony, and defendant excepted.

Witness testified that a portion of the *cul de sac*, as at present surveyed, was embraced within the Chouteau mill tract; but he knew nothing of this personally. He gathered all his information from records in his office.

The defendant then offered the claims of Guion, with the annotations; also the claim of Roy with the annotations; both of which the court excluded, and he excepted.

The defendant also offered the claim of Roy as contained on page 116, with the erasures and without the annotations, which the court excluded.

The defendant then introduced John B. Pourcelli, who testified that the *cul de sac* common field was embraced within the western part of Chouteau's mill tract, and did not embrace the premises in dispute. One or two other witnesses testified to the same thing.

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The court then gave the following instructions for the plaintiff, to the giving of which the defendant excepted :

No. 1. The certified copy of the registry of confirmations, read in evidence, is *prima facie* proof that Joachim Roy inhabited, cultivated or possessed the land therein described prior to the 20th day of December, 1803.

No. 2. The survey made by the Government of the United States of the tract of land confirmed to Joachim Roy, or his legal representatives, is *prima facie* evidence of the true location of the land so confirmed. And if the jury find from the evidence that the premises sued for in this case are within said survey No. 3307—if the respective wills of Joachim Roy and Veronique Guitard, and the deeds read in evidence by the plaintiff, are genuine, then the plaintiff is entitled to recover in this action, unless the jury should find from the evidence that Joachim Roy, prior to the 20th December, 1803, abandoned his possession and claim of the said premises, or that the lot which he actually cultivated and claimed in the *cul de sac common fields* is not the same that is claimed in part by the plaintiff in this suit.

No. 3. Abandonment of a lot or tract of land is the voluntary relinquishment of the former proprietor of all right or pretence of claim thereto, and such abandonment may be proved by facts and circumstances. And in the case under consideration if the jury find that Joachim Roy, prior to the 20th December, 1803, cultivated, inhabited or possessed the land in question ; before the jury can find that he abandoned the said land, the jury should be satisfied from all the facts and circumstances given in evidence in this case that said Roy voluntarily relinquished all right or pretence of claim to said land. Although the jury may find from the evidence that Joachim Roy, prior to the 20th December, 1803, ceased to cultivate the land in question, that fact of itself is not sufficient to prove that he abandoned his claim to said land.

No. 4. If the jury find for the plaintiff, they should assess his damages at the yearly value of the rents and profits of

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the premises in question from the 17th day of September, 1856, and should also fix the monthly value of such rents and profits at this time.

The defendant then asked the following instructions, which the court refused to give, and the defendant excepted thereto:

No. 1. The evidence of right to the land in question, as shown in the confirmation and surveys given in evidence on the part of the plaintiff, is *inferior* to the evidence of right to the said land as shown by the defendant in his testimony given to the jury in this case.

No. 2. If the jury believe from the evidence that Joachim Roy and his representatives abandoned the possession of the land which said Roy cultivated before 1803, and all the right and title which said Roy had to the same, the plaintiff ought not to recover in this action.

No. 3. If Joachim Roy cultivated a part of the lot in question before the 20th of December, 1803, without having any right, title or claim thereto but such as the law imputed to him on account of such cultivation; if several years before 1808 he ceased to cultivate, and never afterwards cultivated or possessed the same, or asserted any claim to the same as owner; if he died in 1801, and no person claiming to represent his rights did ever inhabit, cultivate or possess the same, (or assert any claim to the same as owner,) these facts are strong evidence of abandonment, and the jury will be well warranted in finding that the plaintiff has no title to the land in question, as derived from the said Joachim Roy.

No. 4. If the jury find that cadet Jean Rion, or his representatives, claimed before the Recorder of land titles the land now embraced in the United States survey No. 3307, in order to make proof and get a certificate of confirmation therefor, under the act of Congress of May 26, 1824; that the Recorder entered the claim on his record in the name of Rion, and made a certificate of confirmation in the name of Rion, and that subsequently the name of Rion was erased and the

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name of Roy inserted in lieu thereof, such alteration of the record and certificate (both or either of them) was without authority and unlawful, and the said Roy or his representatives got no title thereby.

No. 5. The plaintiff claims under one Joachim Roy, in virtue of a confirmation to said Roy or his legal representatives, of the title to a common field in, adjoining or belonging to the town of St. Louis, by force of the act of Congress of June 13, 1812, and the court instructs the jury that that act of Congress gave no title to the said Roy or his representatives to the said field lot, unless over and above the fact that said Roy cultivated part of the land prior to the 20th of December, 1803; it also appears in proof that the said Roy had some right, title or claim to the said land prior to the 20th December, 1803, and that such right, title or claim continued and was in existence on the 13th of June, 1812.

No. 6. Prior to the 20th of December, 1803, the bare fact that Joachim Roy cultivated a portion of land near the town of St. Louis, did not make the said land a common field lot; and if it were in fact a common field lot, the bare fact of its cultivation by Roy did not give to the said Roy any right, title or claim to the said lot as against the Government of Spain, France or the United States.

No. 7. The act of Congress of May 26, 1824, is the only law which empowered the Recorder of land titles to issue certificates of confirmation of lots the titles to which were confirmed by the act of June 13, 1812. And if the jury find that the Recorder did on the 30th July, 1825, (or at any time within eighteen months after the passage of the said act of 1824,) issue a certificate of confirmation for the lot now in question to said Roy, or his representatives, that certificate is the evidence of title in said Roy or his representatives provided by the act of Congress, and the plaintiff, in so far as he claims a part of said lot under said Roy, ought to produce the said certificate in evidence as a legal muniment of his title. 1. If such a certificate were issued by the Recorder,

he thereby exhausted his power in that respect under the statute, and had no power to issue another and different certificate to the same party for the same lot in 1857. 2. The certificate of confirmation given in evidence is illegal and void, being without any authority of law. 3. The certificate of confirmation given in evidence is defective and does not conform to the act of Congress of May 26, 1824, which is the only law which authorized the Recorder to issue any such certificate. 4. In proceeding under the act of Congress of May 26, 1824, the Recorder acted judicially; he had power under the act, for eighteen months after its passage, to take the proofs offered by the claimant of "the fact of inhabitation," cultivation or possession, (of the lot,) together with its extent and boundaries"; and having taken such proofs, if they were satisfactory to him, it was his duty then to issue a certificate of confirmation, setting forth the extent and boundaries of the lot, as proven before him in 1825; and, in issuing a certificate in 1857, he had no lawful power to set forth the extent and boundaries of the lot by a survey then recently made, instead of the testimony lawfully taken before him long before the survey was made.

Gibson, for appellant.

The second instruction given for the plaintiff put the case to the jury on a basis too narrow. It excludes from their consideration the alteration of the record. It excludes from the jury any question as to whether the representatives of Roy (who was buried in 1801, two years before the treaty) abandoned the premises. It excludes all consideration of the question whether Roy or his representatives continued to claim the premises up to 13th June, 1812.

It is obvious that the act of 13th June, 1812, did not grant lands to persons who did not at that time "claim" the land.

The certificate is *prima facie* proof of the possession, &c., prior to 1803, and of the claim on the 13th June, 1812; but the defendant still had the right to insist before the jury that

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Roy's representatives ceased to claim this land prior to 13th June, 1812. (*City of St. Louis v. Toney*, 21 Mo. 254.)

The omission to put the question of abandonment to the jury so as to include Roy's representatives was not accidental. The second instruction asked by the defendant and refused by the court was framed so as to meet this defect. The omission cannot therefore be said to be either accidental or immaterial.

The third instruction given for the plaintiff is erroneous :

1. It tells the jury, first, what abandonment is, and, in attempting to define abandonment, it says it is the voluntary relinquishment of the *former* proprietor of all right, &c. It should have said the proprietor, and not the *former* proprietor. This adjective has a meaning when coupled with the concluding portion of the instruction which again confines the question of abandonment to Roy and excludes his representatives.

2. To tell the jury that the cessation of cultivation by Roy, (again excluding his representatives,) prior to 1803, was not of itself sufficient to prove that he abandoned his claim, was calculated to mislead the jury, and was erroneous. If the court could tell the jury that ceasing to cultivate the premises was of itself no proof of abandonment, it might with equal propriety say that ceasing to inhabit the premises was no proof of abandonment, and that ceasing to possess the premises was not of itself sufficient proof thereof.

Where a question is to be determined by the jury from "facts and circumstances," it is wrong for the court to select one of the "facts or circumstances" and tell the jury that that is not sufficient proof. On this principle the whole case could be taken from the jury. There was no evidence that Roy ever inhabited or possessed the land otherwise than by cultivation. His cultivation of the premises was the only foundation of his "claim."

The first instruction requires the jury to find for the plaintiff, unless they find that Roy abandoned the premises, or that the lot he claimed and cultivated did not embrace the

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premises in dispute. The other instructions narrow this question still more by telling the jury what abandonment is, and by nullifying the effect of the ceasing to cultivate the premises; and the instructions are all so worded as to exclude from the jury the action, or rather the non-action of Roy's representatives, from the time of his death, and also all question as to non-claim subsequent to 1803.

"It is clear that if a claim was abandoned it had no existence at the date of the act, and could not, therefore, be confirmed." (City of St. Louis v. Toney, 21 Mo. 254.) "If the inchoate right, commencing under the Spanish Government, continued in existence until the act of 1812, it was confirmed." (*Ibid.*)

The refusal to give the second instruction was erroneous.

The non-claim of Roy's representatives for more than twenty years subsequent to 20th December, 1803, was competent evidence tending to prove abandonment prior to that date.

Roy had no inchoate title. He cultivated a common field in the *cul de sac*, and when the common field fence, *trait carré*, fell down, he ceased to cultivate it. This fence fell down several years prior to 1803. No claim or possession of any kind was made from that time until 1825, a period of nearly thirty years, when Eustache and François Cayoux, who then owned the "claim" if any one did, appeared before the Recorder and testified that they had no interest in the premises. All these facts should have been permitted to have their due weight before the jury on the question of abandonment.

The court erred in refusing the defendant's fourth instruction.

It is not shown by whom these erasures and interlineations were made. No note or other memorandum whatever exists to show that they were made (by the Recorder or any one else in office under the Government). It is proven by Lane in his letter that they were made long after a certificate had been issued upon the entry as originally made.

The only evidence of a confirmation to Roy's representa-

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tives under the act of 13th June, 1812, is the legal presumption arising from the copy of the registry of confirmation of 1825 by Hunt, and the certificate of confirmation issued in 1857, after this suit was brought. It is not denied that a confirmation under or by the act of 1812 is superior to a New Madrid location, nor that such confirmation may be proved orally at the present time; nor that the registry of confirmation of 1825, or the certificate thereof of 1857, is good against the Government and all claiming under it subsequent thereto. But it is admitted that this land had been appropriated in satisfaction of the New Madrid location certificate in 1818, six years before the passage of act of 26th May, 1824. This was an exchange of this land for the improved land in New Madrid. (See authorities cited by defendant in *Holmes v. Strautman*.) Its officers could not subsequently admit away the title thus granted. Their certificates cannot affect its prior grantee, any more than the certificate or admission of the assignor of a bond subsequent to the assignment that he had previously assigned it to a third person can avail against his assignment. (*Soulard v. Clark*, 19 Mo. 581.)

The owner of the New Madrid location was no party to the proceedings before the Recorder. There was not at that time any record showing a claim to this land, nor any possession or visible indication of a claim, so as to warn the locator of the New Madrid certificate.

The court erred in excluding the annotations of Recorder Hunt on the margin of the two confirmations from pages 49 and 50 and page 116, mutually referring to each other as being one and the same "claim."

The court below erred in excluding the depositions of Francis and Eustache Cayoux. It is not pretended that Roy claimed or ever cultivated or possessed more than one lot in the *cul de sac*.

There is no question that the representatives of Roy appeared before the Recorder and claimed the lot as described on pages 49-50. It is equally clear that these two Cayoux were then the sole representatives of Roy, and that they testified that

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that was the lot Roy cultivated. This claim and the depositions were made under and in pursuance of the "duty" imposed on them to "designate" the lot, and the "boundaries," and "extent" of the same. In other words, it was their duty to locate the lot by "designation, boundaries and extent," by "proof." These depositions are the "proof."

These depositions are admissible for "some purposes." (Clark v. Hammerle, 27 Mo. 55; City of St. Louis v. Toney, 21 Mo. 254.) There is no question of their authenticity. They were objected to on the ground of incompetency only. The question therefore arises as to what effect shall be given to them: First, as testimony taken by the Recorder in performance of his duties under the act of 26th May, 1824, and preserved as a part of the records in his office; second, as the admission, or rather, the stronger case, of the most solemn asseveration or affirmation of the owner at the time; and whether he and those claiming under him are estopped thereby. (City of St. Louis v. Toney, 21 Mo. 256; Clark v. Hammerle, 27 Mo. 55.)

As to the second point—1. A party is estopped to deny his own acts which influence another. (Bank v. Wollaston, 3 Harr. 90; Hicks v. Crain, 17 Ver. 499; Rongely v. Spring, 8 Shep. 130.) 2. These Cayoux were parties, owners and claimants. These depositions were made in the performance of the duty imposed on them by law, and the Recorder acted judicially in determining the validity of their claim. They are therefore admissible as the—1. "Solemn admissions" of the parties. (1 Green. § 27-169); 2. As the declarations of the parties in interest (*ibid.* § 27-169); 3. As judicial admissions. (*Ibid.* § 216).

The court erred in excluding the report of the Surveyor General to the Commissioner of the General Land Office of 19th August, 1852. Neither the act of 1812 nor 1824 makes provision for the survey of private claims, except for the purpose of separating them from school or vacant lands, and a question has been raised whether such surveys are evidence at all except between the Government and the claimants.

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But the court below admitted a survey made in March, 1857, after the commencement of this suit. Now, what was this survey but an official act of the Surveyor General, declaring where this confirmation ought to be located according to the records in his office? Is it not competent to rebut this action of the Surveyor General by the records themselves? This report is an official act of the highest moment, for it is made for the use of the immediate superior of the office, and is prior in point of time to the survey under which the plaintiff claims.

The case stands briefly thus: In 1852 the Surveyor General declares officially that the *cul de sac* common field does not cover the premises in dispute, and in 1857 the Surveyor General declares that it does; and the question being open to the jury, the court admits the one for the plaintiff and excludes the other for defendant.

All the records in the Surveyor General's office relating to the survey and location of the lot, and of course those relating to the locality of the *cul de sac* common field, of which it was a part, are admissible.

Krum & Decker, for respondent.

I. The instructions given by the court below, at the instance of the plaintiff, in respect to the questions of inhabitation, abandonment, location, and the plaintiff's title to the premises in dispute, assert correct rules of law. The vital questions of fact involved in the case were fairly submitted to the jury under proper instructions, and the jury having responded to the issues, this court will not disturb their verdict.

II. The first instruction asked by the defendant (and refused) is clearly erroneous, because it withdraws the questions of fact to which it is directed wholly from the consideration of the jury.

III. The second instruction asked by defendant (and refused) is directed to the question of abandonment. The

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court had already correctly and fully instructed the jury as to what constituted abandonment in the sense of the law, and also that if possession and claim had been abandoned by Roy or his legal representatives, the plaintiff could not recover.

The second and third instructions given at the instance of the plaintiff cover these points fully, and the law as laid down in those instructions has been the rule of this court in numerous cases. The court below having ruled on the same point, there was no necessity of repeating the rule by giving the second instruction. There was no error, therefore, in giving this instruction.

IV. There are two objections to the third instruction refused by the court below :

1. It is a commentary on the evidence ; and,

2. It virtually asserts that possession and cultivation prior to December 20th, 1803, are of no avail under the act of 1812, unless such possession and cultivation were in virtue of some prior grant or title. This is not the law—the contrary of which this court has frequently held. (Page v. Scheibel, 11 Mo. 167 ; Guitard v. Stoddard, How. U. S., &c.)

V. The fourth, seventh, eighth, ninth, tenth and eleventh instructions refused, in effect declare that the certificate of confirmation given in evidence (in the name of Joachim Roy) is void. This point has already been ruled by this court in this case against the defendant. (Clark v. Hammerle, 27 Mo. 55.)

VI. The possession, cultivation, continued claim of Roy and his representatives, as well as the identity of the land in question were pure questions of fact before the jury, under proper instructions of the court, and ought not to be reviewed here. Upon a careful examination of the record, it will be seen that the case was tried in the court below in strict conformity with the rulings of this court in the same case ; we, therefore, invoke the decision made in 27 Mo. 55.

VII. The objection made to the reading of the certificate of

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confirmation issued by the Recorder of land titles and offered by plaintiff is frivolous. The Recorder had the same authority to issue that certificate in 1857 that he or either of his predecessors ever had to issue it, and it was lawful for him to issue it—that is, that he had lawful right to issue it cannot be denied. The objection, that it was issued *after* the suit was begun, is *point no point*. The facts existed prior to the suit, and the certificate is simply evidence of these facts.

VIII. The affidavits of Francis and Eustache Cayoux, which were the proofs taken by Recorder Hunt at the time he made his act of confirmation, were not evidence of any material fact tending to sustain the defence. Admitting (as was held in this case in 27 Mo.) that those affidavits are *hearsay evidence*, the question arises what is the hearsay or secondary evidence they establish? It is simply that Joachim Roy inhabited and cultivated the land in question until the common field fence fell down in 1798 or 1800. This evidence is not necessary to the defendant's defence. (*Williams v. Carpenter*, 28 Mo. 453.)

IX. The rejection of the testimony offered by the defendant, viz., that Recorder Renard had always treated certain "annotations" made on the margin of certain claims as part of the record, was proper. This evidence had nothing to do with the question at issue. It had nothing to do with the question of abandonment. This evidence was offered for the purpose of invalidating the certificate of confirmation given in evidence by the plaintiff. In other words, the effort was made to prove by the annotations that the confirmation was made to Rion and not to Roy.

X. The exclusion of the report of the Surveyor General made August 19, 1852, was manifestly correct. It is at best simply the Surveyor's *opinion* as to the proper method of making certain surveys. Upon the question of *location*, the Surveyor General was a competent witness, and might have been called. His report did not originate with the plaintiff,

nor had he any lot or part in it. The report is wholly *ex parte*, and does not assume to confirm or change any one of the surveys mentioned in the report. This fact is sufficient to justify the exclusion of the report. Whenever a Register, Receiver or Surveyor General does an official act authorized, whether such official act be evidenced by correspondence, report, or other written form, doubtless a certified copy may be given in evidence if the act is pertinent to the question at issue. But in this case the Surveyor, by his report, does nothing, nor does he propose to do anything; on the contrary, he expressly says that he does not propose to disturb "old surveys," &c.

It cannot be shown from the Surveyor's report that it contains any evidence of an official act of his. Hence, the whole was irrelevant, and only calculated to mislead the jury.

To show that official correspondence is only evidence of official acts, see *Coleman v. Johnson*, 29 Mo. 84.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff claimed title to the land in controversy as a part of the common field lot of the *cul de sac* common field of St. Louis, as having been confirmed to Joachim Roy's legal representatives by the act of Congress of the 13th of June, 1812, on the ground of inhabitation, cultivation or possession prior to the 20th of December, 1808, and he showed a derivative title from them to himself. To prove this title he gave in evidence certified copies of the registry of claims proved before the Recorder of land titles under the act of 26th of May, 1824; the registry of certificates of confirmation or list of claims proved; an official survey by the Surveyor General of the lot so proved, and a certificate of confirmation issued by the Recorder of land titles in 1857. Documents of like character with these have so often been held to be admissible as *prima facie* evidence of such titles that it is not deemed necessary now to discuss the subject further. (Mack-

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lot v. Dubreuil, 9 Mo. 473; Bichler v. Coonce, 9 Mo. 347; Soulard v. Allen, 18 Mo. 590.)

The two documents first named speak of this claim as one and a half arpens in "front by about thirty in depth," bounded north by Guion, south by Tabeau, east by Aug. Chouteau's mill tract, and west by Chas. Gratiot. The lot appears to have been surveyed according to the calls for boundaries, rejecting the call for the quantity of "about thirty arpens in depth," so far as that call was repugnant to the calls for fixed boundaries. This was unquestionably the correct mode of surveying the lot proved; and the certificate of confirmation which was issued thereon by the Recorder of land titles, in 1857, very properly conformed to the official survey so made.

These proofs showed title in Roy's representatives to the lot described in the survey and certificate of the date of the act of 18th June, 1812.

The defendant claimed title to the same land under a New Madrid location of the date of 1818. Such title, though inferior in nature, placed him in a position that enabled him to dispute the correctness and validity of the *prima facie* superior title of the plaintiff. He undertook to invalidate this title by evidence offered for the purpose of showing that the survey of the lot and the certificate of confirmation were incorrect in respect of the location, extent and boundaries of the lot, and that the lot claimed and cultivated or possessed by Roy prior to 1803 had been abandoned by him and his legal representatives before the 13th day of June, 1812.

Concerning the location, extent and boundaries, he offered in evidence a letter from Wm. Carr Lane to Surveyor General Milburn, dated June 20, 1840, while Lane was owner of the plaintiff's title, in which he asserted as of his own certain knowledge, that the proof taken before the Recorder on page 116 of No. 2 of his Minutes, called for *forty* arpens in depth instead of *thirty*, before the record was altered by erasure, and that the claimant's name (Bion) and the word *forty* had been erased, and a subsequent interlineation made

of another name (Roy) and the word *thirty*, together with certified copies of these Minutes (No. 2, pp. 49 and 50) showing the claim of Joachim Roy's legal representatives for a lot of one and a half by about forty arpens in depth, bounded north by a lot formerly owned by Mad. Lecompte, east by widow Camp's legal representatives, south by Tabean, and west by land unknown near to Gratiot's, and the extract from the registry of certificates above mentioned, which were admitted, and also the depositions of Francis and Eustache Cailloux thereto annexed, containing the testimony taken by the Recorder on proof of the cultivation and possession of the lot so claimed, which were excluded. Some other documentary evidence, relating to adjoining claims, was admitted. The testimony of Adolph Renard, offered for the purpose of showing that certain marginal annotations on page 116 of Hunt's Minutes were in the handwriting of Recorder Hunt, was excluded. There was some testimony which tended to show that the *cul de sac* common fields were embraced within the western part of Chouteau's mill tract, and that they did not cover the land in dispute. The jury have passed upon the question of location, upon the evidence that was before them, and we need concern ourselves only with that which was excluded.

In the former decision in this case, (27 Mo. 55,) these erasures and alterations were not regarded as in any way defeating the right and title of Roy and his representatives, who showed a confirmation independent of them, and we do not see how they could have any material effect upon the title shown by the plaintiff. The marginal annotations were held to be no evidence whatever as between these parties, and they will be regarded as wholly immaterial here. So far as these erasures and interlineations furnished evidence that the claim had a depth of forty instead of thirty arpens, these were clearly not evidence for the plaintiff; but there was ample evidence without them to authorize the survey, as it was made. So far as they tended to show that one Rion had claimed the same lot before the


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Recorder, they were immaterial to the issue, and as tending to show another and different lot, the defendant had the benefit of the evidence with the jury. There was no evidence that Rion had ever obtained a title to this lot. The evidence amounted to very little towards rebutting the plaintiff's title.

The defendant complains of the exclusion of the depositions or testimony of the two Cailloux. For what purposes and to what extent these depositions are admissible in evidence, the previous decisions of this court are by no means clear, nor shall we now undertake to lay down any rule on the subject. It appears that in a former trial their depositions were read in evidence as a part of the documents offered by the plaintiff, and this court held that being thus before the jury, they were open to the defendant for what they were worth as evidence of abandonment by the two Cailloux, but that in themselves they were not admissible evidence of the facts stated in them. Here they were offered by the defendant, and as we think rightly excluded.

There was little or no evidence before the jury which had any tendency to prove abandonment. Roy died in 1801, leaving the lot to Veronique Guitard. She died in 1808, leaving it to the two Cailloux. It was confirmed to Roy's representatives in 1812, and in 1825 they brought the claim before the Recorder of land titles.

The Spanish law of abandonment continued in force until 1816, and any abandonment that could affect this lot must have taken place before 1812. To constitute abandonment there must be a departure of the owner corporeally from the land, with the intention that it shall be no longer his. Corporeal or actual possession need not be retained; but if the owner retain the property of it in his mind, no other person has a right to enter, and it is not abandoned. (*Landes v. Perkins*, 12 Mo. 256; *Fine v. Public Schools*, 30 Mo. 166.) The intention to abandon may be inferred from facts and circumstances which are competent to go to the jury as evidence from which that fact may be rationally inferred by the jury; and it is peculiarly a question of fact for the jury.



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Ceasing to cultivate, mere inaction, removal to another place, is not enough, without some act of disclaimer or other fact importing and showing a positive intention to abandon all claim of ownership. (Page v. Schiebel, 11 Mo. 188.) Where the owner went to France and signified his intention never to return, that was held to be good evidence of abandonment (Salle v. Primm, 3 Mo. 530); and where the owner quit his occupancy, removed his mill from the land, and in 1808 made a sworn inventory, as an insolvent, which did not contain the lot, these facts were held to be evidence for the jury. (Barada v. Blumenthal, 20 Mo. 162.)

We find no evidence in this record of any facts of this nature, which can be said of themselves to import or to have any direct tendency to show an intention on the part of any one of the successive owners and claimants, during the period of time when they were owners prior to 1812, to abandon their claim to this lot. The possession of land is presumed to be with the owner of the title until the contrary is made to appear. Even if the depositions of the two Cailloux had been admissible in evidence, they could have no proper effect to prove an abandonment of this lot by them during the period between 1808 and 1812, when they were owners and might have abandoned their claim. The mere fact that they stated in their testimony, apparently taken in proof of the claim of Rion, that they had no interest in the lot, if it had been in fact the same lot as that of Roy, would import no more than that if they were then the owners of it, they were not at that moment aware of the fact.

The instructions given for the plaintiff laid the case fairly before the jury on the questions of title, of identity, and of abandonment. It is objected that they were too narrow, and confined the question of abandonment to Roy alone. It may be answered that there was no evidence of any abandonment by his representatives on which to predicate any further instruction in the matter; and the instructions which were refused for the defendant, on the same subject, were rightly enough refused, for the reason that there was no founda-

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tion in the evidence on which such instructions could justly be predicated.

The fifth and sixth instructions asked by defendant had no basis in the law or the evidence, and were properly refused. The plaintiff had shown a complete *prima facie* title; the defendant had shown nothing that could invalidate it, and nothing remained but the matter of the true location, and on that the jury was to pass as a matter of fact. The first instruction was correctly refused for the same reason. (Page v. Scheibel, 11 Mo. 167; Guitard v. Stoddard, 16 How. U. S. 510.)

The report of the Surveyor General to the Commissioner of the General Land Office, detailing the history of his operations in making surveys, was properly excluded. The official surveys of the lots in question were the proper evidence of the final action of the Surveyor General on the subject of these surveys.

The case appears to have been fairly submitted to the jury, upon correct instructions as to the law of the case, and there being no material error injuriously affecting the rights of the defendant, the verdict must be allowed to stand.

Judgment affirmed. Judge Wagner concurs; Judge Lovelace did not sit.



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ERRATA.

In the cases of *Lincoln v. Hilbus*, *State v. Phillips et al.*, and *State v. Smith*, on p. 149, Judge WAGNER delivered the opinion of the court.

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A

ACTION.

1. *Partnership—Dormant Partner.*—In cases of a dormant partnership, while the credit is given to an ostensible partner because no other is known to the creditor, yet the creditor may also sue the secret partner when discovered, and the credit will not be presumed to have been given on the sole responsibility of the ostensible partner.—*Richardson et als. v. Farmer et al.*, 35.
2. *Contract not to sue—Answer.*—A covenant or agreement not to sue upon a claim, cannot be pleaded in bar of the prosecution of an action upon such claim. The remedy of the party is by an action upon the covenant or agreement. An answer setting up an agreement not to sue, presents no defence to an action.—*Bridge et als. v. Tierman*, 489.
3. *Bank—Negligence.*—A bank receiving for collection a check payable at a subsequent date, and presenting the same for payment upon the day named without allowing days of grace, is liable to an action by the owner of the check for its negligence in making demand.—*Ivory v. Bank of the State of Mo.*, 475.
4. *Damages—Negligence.*—The same rigid rule in determining what will be a bar to an action on the ground of contributory negligence will not be applied to an infant, an idiot, or an insane person, as to one who had arrived at an age to possess ordinary judgment and discretion. All that is necessary to give a right of action to the plaintiff for an injury inflicted by the negligence of the defendant, is, that he should have exercised care and prudence equal to his capacity.—*Boland & wife v. Missouri R.R. Co.*, 484.
5. *Deed of Trust—Power.*—A. sued the trustee in a deed of trust, and the holder of the notes thereby secured, alleging in his petition that by the power notice of the sale was to be given by advertisement inserted in newspapers printed in St. Louis and Franklin counties, and that notice was only published in Franklin county; and alleging also, that, by the wrongful, oppressive and fraudulent conduct of the holder of the notes, in combination with the trustee, bidders were deterred from bidding, the property was sacrificed, and brought less than parties were ready and willing to bid for it: *Held*, that as by the petition it appeared that the sale was void both in law and equity, no action at law for damages could be sustained.—*Thornburg v. Jones et al.*, 514.
6. *Constitution—Eminent Domain.*—Where the charter of a railroad corporation gives to the company authority to enter upon lands near the line of the

ACTION—(Continued.)

road, and to take therefrom materials to be used in its construction, and provides for ascertaining the damages at the instance of either party, the common law remedy is superseded by the statute, and the party injured cannot sue the corporation at law. Where either party may be the actor, neither can complain that the other did not begin.—Lindell's Adm'r v. Han. & St. Jo. R.R. Co., 548.

7. *Trespasses*.—The "Act concerning trespasses" (R. C. 1855, p. 1582) contemplates voluntary or wilful trespasses only, which are done without lawful right.—*Id.*
8. *Constitution—Eminent Domain*.—Where the Legislature authorizes property to be taken for public uses, and at the same time provides how the damages for such taking may be assessed at the election of either party, and redress obtained, the common law remedy will be taken to be superseded; but where no such remedy is given at the election of the party complaining of the injury, the common law right of action remains unaltered.—Soulard v. City of St. Louis, 546.
9. *Counties*.—Counties are *quasi* corporations, created by the Legislature for purposes of public policy, and are not responsible for the neglect of duties enjoined on them, unless the action is given by statute.—Reardon v. St. Louis County, 555.

ADMINISTRATION.

1. *Partnership—Bond*.—The creditor of a partnership under process of administration cannot sue upon the bond of a surviving partner unless he present his demand to the surviving partner to be classified within two years, or have the same allowed against the estate of the deceased partner. Unless the claim be thus presented, the partnership estate will belong to those who do establish their claims, and all others will be cut out from its benefit. (R. C. 1855, p. 125, § 68.)—State to use of Taylor v. Woods et als., 73.
- 2.—*Limitations*.—If the administrator give notice of the grant of letters, all claims not presented within three years will be barred, unless the creditor can bring himself within the exceptions of the statute. The presentation of the claim in the manner provided by the statute will save the limitation. Proof that the civil law was suspended, on account of the war, during a portion of the period, will not extend the time for presenting the claim.—Richardson, Adm'r, v. Harrison, Adm'r, 96.
3. *Practice*.—Where an action has been commenced for damages done to real estate, if the plaintiff die pending the suit, it may be revived and conducted by the administrator.—Clark's Adm'r v. Han. & St. Jo. R.R. Co., 202.
4. *Guardian and Ward—Securities*.—The securities of a curator who has committed a breach of his bond by converting the moneys of his ward to his own use, will be held liable upon their undertaking although the curator may have subsequently given an additional bond, and have made settlements carrying down the balance due his ward so as to make the securities upon the new bond also liable. A judgment against the securities in the second bond for the whole balance due at the last settlement of the curator, will not discharge the securities upon the first bond from their liability for any

ADMINISTRATION—(*Continued.*)

- acts done before the second bond was given. There can be but one satisfaction, but the ward may pursue all his remedies until he has been fully paid. *Quers* as to the liability of the securities upon the different bonds to contribution.—*State to use Drury v. Drury et al.*, 281.
5. *Partnership*.—The surviving partner administering upon the effects of the partnership is obliged to account only for such effects and assets as actually come into his hands as surviving partner. Sec. 68, p. 125, R. C. 1855, has no application to the surviving partner, but to the administrator of the deceased partner, in respect to the excess of funds he might receive from the surviving partner upon such settlement.—*Crow et als. v. Weidner*, 412.
6. *Partnership*.—Under the act R. C. 1855, p. 121, &c., the powers of the surviving partner are not changed or restricted, otherwise than that he is required to give security for faithful administration of the assets, and payment of the balance due after paying the partnership debts, &c. He is not required to pay the claims presented *pro rata*, but may pay in full such as he sees fit.—*Id.*
7. *Judgment—Estoppel*.—*Hempstead v. Hempstead's Administrator*, affirmed. Where no action can be sustained against the administrator, none can be maintained against his securities; and a judgment in favor of the administrator is a bar to a suit, upon the same subject matter, against the securities, as they are in privity with him.—*State to use, &c., v. Coste et al.*, 437.
8. *Conveyance*.—Under the act (R. C. 1855, p. 38, §§ 20, 21 & 25) it was not necessary that the deed of the administrator, conveying the land of the decedent under a sale made by order of the probate court, should recite the fact of the report of sale and its approval by the court. The deed reciting the order of sale and sale would be *prima facie* evidence of title, and it rests upon the party controverting the effect of the deed to prove affirmatively that the sale was not approved.—*Knowlton v. Smith*, 507.

AGENCY.

1. *Bill of Exchange—Notice*.—The cashier of a bank, the holder of a bill of exchange, is the agent of the holder, and is competent to give the notice of demand and refusal of payment.—*Bank of the State of Mo. v. Vaughan et al.*, 90.
2. *Attorney—Authority*.—Where several suits were brought by the same plaintiff against different defendants (the defences being the same in each case) and the attorneys of the several parties agreed that all the cases should abide the final decision in one case; *held*, that the agreement was within the authority of the attorneys and was binding upon the parties.—*North Mo. R.R. Co. v. Stephens*, 150.
3. *Master and Servant—Contractor*.—A railroad company is not liable for the injuries occasioned by the trespass or negligence of the servants and laborers employed by the contractor engaged in building the road. The principle of *respondent superior* applies to the contractor who employs the men, but not to the corporation with which the original contract is made. There can be but one responsible master for the same servants, and when that relation ceases the liability ceases also.—*Clark's Adm'x v. Han. & St. Jo. R.R. Co.*, 202.

AGENCY—(Continued.)

4. *Damages—Loss of Life.*—Under the second section of the "Act for the better security of life and property," (R. C. 1855, p. 647,) the representatives of a servant can maintain an action against the master, if the death be occasioned by the negligence, unskillfulness or criminal intent of a fellow-servant. The burden of proof is upon the plaintiff to show negligence in such cases.—*Schultz v. Pacific Railroad*, 13.
5. *Damages—Carriers—Railroads.*—The provision of the act (R. C. 1855, p. 647, § 2) relating to passengers dying from injuries occasioned by defects in the railroad or means of transportation, applies only to those transported or carried as passengers. Where the relation is properly that of master and servant, this particular clause of the act has no application. (See ante *Schultz v. Pacific R.R.*, 13.) When the passenger by his own misconduct or negligence contributes to the injury, as by riding in the baggage car, contrary to the rules of the railroad, he cannot recover in case of injury.—R. C. 1855, p. 498, § 54.—*Higgins, Guard'n, v. Han. & St. Jo. R.R. Co.*, 418.
6. *Bankers—Lien.*—Where there is no mutual agreement or previous course of dealing between bankers whereby it is expressly or impliedly understood, that remittances of notes or bills when received or collected are to be placed to the credit of previous accounts, or when no advance is made or credit given upon the faith of the particular bills remitted, or of the usual course of dealing, the owner of the bill or note remitted for collection, through his banker, may sue for and recover the amount of said bill or note, although the collecting banker may have carried such amount to the credit of his correspondent in payment of a subsisting indebtedness.—*Millikin et al. v. Shapleigh et al.*, 596.

ATTACHMENT.

1. *Garnishee.*—The garnishee stands in the relation of debtor to the defendant in the attachment suit, and any defence that he can set up against such defendant, he may also use in resisting the claim of the attaching creditor.—*Firebaugh et al. v. Stone, Garn.*, 111.
2. *Garnishee—Execution.*—The defendant in the execution stands to the garnishee in the relation of creditor to debtor; and the plaintiff in the execution, in order to recover, must prove the indebtedness in the same manner as the defendant would be compelled to do had he sued the garnishee.—*Karnes v. Pritchard, Garn.*, 135.
3. *Justices' Courts—Garnishees.*—The garnishee in an execution from a justice of the peace answering, "that he was indebted to the defendant, but could not then state the amount due, as he had a set-off," was allowed time to file an additional answer; *held*, that allowing time was within the discretion of the justice.—*Id.*
4. *Demand not due.*—An attachment cannot issue, upon a demand not due, for any of the causes specified in the subdivisions 1, 2, 3 & 4 of § 1, R. C. 1855, p. 228.—*Kinear v. Shands*, 379.
5. *Landlord and Tenant.*—The removal by a tenant of a small portion of his furniture for temporary use elsewhere, the tenant not intending to leave the premises, will not authorize the landlord to sue out an attachment against

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the tenant under the act of "Landlords and Tenants." (R. C. 1855, p. 1016, § 26.)—*Id.*

6. *Garnishes.*—The pendency of a suit against the garnishee by the defendant in the attachment or execution will not relieve the garnishee from his liability under the garnishment. After being summoned as garnishee he cannot pay the money due to the attachment or judgment debtor.—*Lieber v. St. Louis Agr. & Mech. Ass'n, Garn.*, 392.

ATTORNEY.

1. *Authority.*—Where several suits were brought by the same plaintiff against different defendants—the defences being the same in each case—and the attorneys of the several parties agreed that all the cases should abide the final decision in one case; *held*, that the agreement was within the authority of the attorneys, and was binding upon the parties.—*North Mo. R.R. Co. v. Stephens*, 150.
2. *Note—Assignment.*—An attorney who receives a note for collection after its maturity, has no power to sell and assign the note.—*Goodfellow v. Landis*, 168.
3. *Constitution.*—The provisions of the new Constitution, Art. II., §§ 6, 9 & 8, which prohibit attorneys and counsellors-at-law from practising in the courts of this State until they have taken and filed the "oath of loyalty," so called, are not in conflict with the Constitution of the United States; they do not impair the obligations of a contract, nor are they in the nature of an *ex post facto* law, nor an attainder.—*State v. Garesché*, 256.

ATTORNEY GENERAL.

1. *Salary.*—The act of the General Assembly of February 13, 1865, (Sess. Acts 1865, p. 124,) increasing the salary of the Attorney General, took effect from its passage and was entirely prospective in its operation. It did not retrospectively increase the salary from the commencement of the quarter of that year.—*State ex rel. Attorney General v. State Auditor*, 66.

B

BAILMENT.

1. *Damages—Carriers—Railroads.*—The provision of the act (R. C. 1855, p. 647, § 2) relating to passengers dying from injuries occasioned by defects in the railroad or means of transportation, applies only to those transported or carried as passengers. Where the relation is properly that of master and servant, this particular clause of the act has no application. (See *ante* *Schultz v. Pacific R.R.*, 13.) When the passenger by his own misconduct or negligence contributes to the injury, as by riding in the baggage car, contrary to the rules of the railroad, he cannot recover in case of injury. (R. C. 1855, p. 438, § 54.)—*Higgins, Guard., v. Han. & St. Jo. R.R. Co.*, 418.
2. *Bank—Negligence—Action.*—A bank receiving for collection a check payable at a subsequent date, and presenting the same for payment upon the day named without allowing days of grace, is liable to an action by the owner of the check for its negligence in making demand.—*Ivory v. Bank of the State of Mo.*, 476.

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3. *Contract—Consignee—Lien.*—A. at St. Louis made an arrangement with B. at New Orleans mutually to consign produce to each other for sale, B. being authorized to draw bills of exchange for three-fourths of the value of the shipments made by him, the proceeds of sales to be carried to general account. In the course of business, there was a balance of ten thousand dollars in favor of A. upon general account. B. subsequently made a shipment to A. and drew his bill of exchange predicated upon such shipment, and transferred the bill to C., a banker, showing him the letter of credit, the invoice and bill of lading for the goods shipped. C. advanced to B. part of the amount for which the bill was drawn. *In transitu*, the goods shipped were attached by a creditor of B. A. received the bill of lading and invoice two days before the goods were attached. After the attachment the bill of exchange was presented to A. at St. Louis for acceptance, which was refused. A. subsequently replevied the goods in the hands of the sheriff, and after suit commenced paid C. the amount advanced by him and received the protested bill. *Held*, that A. had such a lien upon the goods that he was entitled to maintain his action, and that his title was better than that of the attaching creditor.—*Vallé et al. v. Cerré's Adm'r*, 575.
4. *Factor—Lien.*—Where, by the terms of the agreement between the factor and his consignor, the proceeds of the sale of goods consigned are to be remitted to the consignor, the factor has no property in the goods consigned by the bill of lading, as against an attaching creditor of the consignor, until the goods come into his actual possession. This case distinguished from that of *Vallé et al. v. Cerré's Adm'r*, *ante* p. 575.—*Bruce v. Andrews*, 598.

BILLS AND NOTES.

1. *Practice—Variance.*—A bill was made payable at "the Bk. of Mo. at St. Louis"; the petition alleged presentment of the bill "at the Bank of the State of Missouri at St. Louis, Mo., the place designated in said bill for payment." *Held*, no variance.—*Bk. of the State of Mo. v. Vaughan et al.*, 90.
2. *Notice.*—A bill payable at St. Louis was protested for non-payment, and the notary enclosed the notices to the drawer and endorsers to the last endorser at Springfield, Mo., which was the proper post-office address; he deposited the notices, on the day of their receipt, in the post-office at Springfield. There being no evidence that the prior endorsers and drawer resided in the town of Springfield, *held*, that the notices were properly served.—*Id.*
3. *Notice—Agent.*—The cashier of a bank, the holder of a bill of exchange, is the agent of the holder, and is competent to give the notice of demand and refusal of payment.—*Id.*
4. *Stamp—Evidence.*—Under the act of Congress of March 3, 1863, a note executed before June 1, 1863, is admissible in evidence if the proper stamp be affixed before it is thus offered.—*Day v. Baker et al.*, 125.
5. *Protest—Endorsers—Evidence.*—To secure the liability of the endorsers of a bill of exchange, or negotiable promissory note, demand of payment must be made of all the makers, and notice of demand and refusal must be given to the endorsers. A notary's protest, which stated "that he presented the same at the office of the makers and was refused payment," without stating from whom payment was demanded, does not show a proper

BILLS AND NOTES—(Continued.)

- demand and refusal of payment. In a suit against endorsers, such protest may be properly excluded as evidence. A demand of payment may be made by the holder of the note or bill, or any agent for him.—*Nave v. Richardson et als.*, 180.
6. *Attorney—Assignment.*—An attorney who receives a note for collection after its maturity, has no power to sell and assign the note.—*Goodfellow v. Landis*, 168.
7. *Endorsement.*—An endorsement in blank of a promissory note by the holder to a third party, is evidence of an assignment for value, only when the note is taken in the ordinary course of trade.—*Id.*
8. *Endorser.*—To render the endorser of a negotiable promissory note endorsed after maturity liable as endorser to the holder, payment must be demanded of the maker, and notice of such demand and refusal of payment must be given to the endorser.—*Armstrong v. Armstrong*, 225.
9. *Grace.*—A check drawn upon a bank, requesting it to pay money, at a day subsequent to its date, to a third party, or order, is entitled to grace; and a presentment on the day named is not a good presentment so as to bind an endorser upon demand and refusal of payment and notice.—*Ivory v. Bank of the State of Mo.*, 475.
10. *Bank—Negligence—Action.*—A bank receiving for collection a check payable at a subsequent date, and presenting the same for payment upon the day named without allowing days of grace, is liable to an action by the owner of the check for its negligence in making demand.—*Ivory v. Bank of the State of Mo.*, 475.
11. *Practice.*—The holder of a note who has purchased the same for value may, under our statute, maintain an action in his own name without an endorsement.—*Harvey et al. v. Brooke*, 498.
12. *Bonds—Assignment.*—The maker of a note payable in property cannot, as against an assignee in good faith, before maturity, for value, set up a defence he may have had against the payee, if the note be written "for value received, negotiable and payable without defalcation." (R. C. 1856, p. 822, § 8.)—*Smith et al. v. Giegrich*, 869.
13. *Protest—Evidence.*—The official protest of a notary is the proper legal evidence of the presentment, demand and refusal of payment of a foreign bill of exchange, and such protest cannot be dispensed with as in cases of inland bills.—*Com. Bank of Ky. v. Barksdale et als.*, 563.
14. *Protest—Notary Public.*—The presentment and demand of payment of a foreign bill of exchange must be made by the same notary who protests the bill; it cannot be done by his clerk, nor by any other person as his agent, although he be also a notary. Notaries are public officers, and as such cannot act as partners. A protest made by one notary, when another notary made the demand of payment, is not a legal protest. The protest, or the noting of the bill for protest, must be made upon the same day the presentment is made.—*Id.*
15. *Conflict of Laws—Lex Loci.*—A foreign bill of exchange must be presented for payment upon the day on which it is payable by the law of the place of payment.—*Id.*

BILLS AND NOTES—(Continued.)

16. *Excuse of Notice*.—The drawer of a bill of exchange who, by his course of dealing with his correspondent, has reasonable cause for believing that his drafts will be duly honored, is entitled to notice of protest.—*Id.*
17. *Acceptance*.—A written contract to accept a non-existing bill of exchange, must point to the particular bill and describe it in express terms (R. C. 1855, p. 298, § 8). A general letter of credit is not an acceptance of a particular bill; but a party taking a bill upon the faith of such letter can maintain an action against the promissor to recover the amount advanced.—Vallé et al. v. Cerré's Adm'r, 575.
18. *Contract—Letter of Credit*.—A. at St. Louis gave to B. at New Orleans a letter of credit, authorizing B. to draw bills of exchange predicated upon actual shipments made to A. to the amount of three-fourths of the value of such shipments. *Held*, that such letter was a general authority, and was to be construed most strongly against the giver of the power; and that a banker, taking a bill thus drawn, could not be required to look beyond the letter of credit, the invoice, and bill of lading, to determine whether B. had exceeded his power by drawing for a larger amount than he was authorized.—*Id.*

BOATS AND VESSELS.

1. *Limitations*.—Suits, under the act R. C. 1855, p. 818, § 42, against boats and vessels upon running accounts for supplies, &c., must be brought within six months after date of the last item in the account.—Madison County Coal Co., v. St. bt. Colona, 443.
2. *Lien*.—A party has a lien upon a boat for labor done and services rendered in getting out a boat and placing her in a position to begin her voyage, and in such cases there is none the less a lien because part of the service consisted in towing the boat.—*Id.*

BONDS AND NOTES ASSIGNABLE.

See ADMINISTRATION, 1, 4.

1. *Assignment*.—The maker of a note payable in property cannot, as against an assignee in good faith, before maturity, for value, set up a defence he may have had against the payee, if the note be written "for value received, negotiable and payable without defalcation." (R. C. 1855, p. 322, § 8.)—Smith et al. v. Giegrich, 369.

C

CITY OF HANNIBAL.

See COURTS, 2.

CITY OF ST. LOUIS.

See REVENUE, 5, 6, 7, 8, 9, 10.

CONFLICT OF LAWS.

1. *Foreign Judgment—Limitations*.—Where the statute of limitations of the State in which a judgment is recovered operates to extinguish the contract or debt itself, the case no longer falls within the law of limitation of the remedy; and when such judgment is sued upon in another State, the *lex*

CONFLICT OF LAWS—(Continued.)

loci contractus, and not the *lex fori*, is to govern.—*Baker v. Stonebraker's Admr's*, 888.

2. *Bills of Exchange—Lex Loc.*—A foreign bill of exchange must be presented for payment upon the day on which it is payable by the law of the place of payment.—*Com. Bank of Ky. v. Barksdale et als.*, 568.

CONSTITUTION.

1. *Governor—Executive Power—Process.*—The Governor, representing the sovereign executive power in the State, is always virtually present in his courts for the purpose of executing the mandates and process of the courts, whenever the power of the marshal and an ordinary *posse* may not be sufficient for the purpose, or when the peace and dignity of the State may so require.—*Thomas v. Mead et al.*, 282.
2. *Supreme Court.*—It belongs peculiarly to the Supreme Court to put a final construction upon the Constitution and statute laws of the State.—*Id.*
3. *Attorneys.*—The provisions of the new Constitution, Art. II., §§ 6, 9 & 8, which prohibit attorneys and counsellors-at-law from practising in the courts of this State until they have taken and filed the "oath of loyalty," so called, are not in conflict with the Constitution of the United States; they do not impair the obligations of a contract, nor are they in the nature of an *ex post facto* law, nor an attainder.—*State v. Garesché*, 256.
4. *State—Church.*—The State has the power to regulate, control or prohibit any trade, business, or profession, within the limits of its jurisdiction. The provisions of the new Constitution, Article II., sections 6, 9, 14 and 8, do not conflict with the provisions of the Constitution of the United States. Such provisions are not in the nature of an *ex post facto* law, nor of a bill of attainder. A bill of pains and penalties is a law in the nature of a judicial act declaring a person's estate confiscated, or forfeiting some right, without giving him the right to be heard before a judicial tribunal, and by its own force inflicts the penalty. The provisions of Art. II. merely prescribe certain prerequisites for the doing of certain acts, and inflicts a penalty only for failing to comply with the conditions prescribed.—*State v. Cummings*, 268.
5. *Ex post facto Law.*—The provisions of Art. II., §§ 6, 9, 14 & 8, are not in the nature of an *ex post facto* law, for they do not impose any penalty for any act previously done; but punish the doing of some future act unless certain terms are complied with, which is violating an existing law.—*Id.*
6. *Declaration of Rights.*—The provisions of Art. II., §§ 3, 6, 9 & 14, of the new Constitution do not conflict with the provisions of Art. I.—*Id.*
7. *Election—Office.*—By the Constitution, Art. II., § 8, no vote can be counted for, nor any certificate of election granted to, any candidate who has not taken and filed the oath of loyalty within fifteen days next preceding the election. A certificate of election granted to one who has not thus taken and filed the oath is null and void.—*State ex inf. Att'y Gen. v. McAdoo*, 452.
8. *Office—Appointing Power.*—Under the Constitution, the Governor has not the power to fill by appointment a vacancy in the office of sheriff occurring

CONSTITUTION—(Continued.)

- after the Constitution went into effect. Such vacancy must be filled in the manner provided in Art. IV., §§ 23 & 24.—State ex inf. Attorney Gen. v. McAdoo, 453.
9. *Evidence*.—It is competent for the Legislature to change the rules of evidence, and prescribe what shall be the effect of evidence in future suits, as well as to change the remedy.—City of St. Louis to use, &c., v. Ceters, 456.
10. *Special Tax*.—Cases of Egyptian Levee Co. v. Hardin (27 Mo. 495), and City of St. Joseph v. Anthony (30 Mo. 539), affirmed.—City of St. Louis, to use McGrath et al. v. Clemens, 467.
11. *Eminent Domain—Action*.—Where the charter of a railroad corporation gives to the company authority to enter upon lands near the line of the road and to take therefrom materials to be used in its construction, and provides for ascertaining the damages at the instance of either party, the common law remedy is superseded by the statute, and the party injured cannot sue the corporation at law. Where either party may be the actor, neither can complain that the other did not begin.—Lindell's Adm'r v. Han. & St. Jo. R.R. Co., 543.
12. *Action—Eminent Domain*.—Where the Legislature authorizes property to be taken for public uses, and at the same time provides how the damages for such taking may be assessed at the election of either party, and redress obtained, the common law remedy will be taken to be superseded; but where no such remedy is given at the election of the party complaining of the injury, the common law right of action remains unaltered. (See Lindell's Adm'r v. Han. & St. Jo. R.R. Co., ante p. 543.)—Soulard v. City of St. Louis, 547.
13. *Eminent Domain—Corporations, Municipal and Private*.—There is a well recognized distinction as to liability between the acts of a municipal corporation in the discharge of such legislative functions as have been delegated to it by the State, and those acts done by a mere private corporation in the prosecution of enterprises for its own advantage or benefit. In the former case, no action can be maintained holding it responsible, where it is pursuing in a legal manner the power thus delegated to it.—Soulard v. City of St. Louis, 546.
14. *Officers—Quo warranto*.—Under the new Constitution, officers failing to take and file the oath prescribed, forfeit their offices, and upon a proper information judgment of ouster will be entered.—State ex inf. Circuit Attorney v. Bernoudy, 279.

CONTRACT.

- See AGENCY, 6. BAILMENTS, 2, 3, 4. BILLS AND NOTES, 18. PARTNERSHIP. SALES.
1. *Sale—Delivery*.—In a contract for the sale of goods to be delivered at a future day, where the place of delivery is not fixed by the terms of the contract, it is the duty of the seller to tender the goods at the residence or place of business of the purchaser; or if the goods be inconvenient to transport, he must seek the vendee a reasonable time before the day of delivery, and ask him to appoint the place of delivery.—Stillwell v. Bowling, 810.

CONTRACT—(Continued.)

2. *Sale—Estoppel.*—A party claiming to be the owner of goods by purchase and delivery, is estopped by the levy of an execution in his favor upon the same goods as the property of the defendant in the execution.—*Langedorf et al. v. Field et al.*, 440.
3. *Sale.*—Possession of personal property is presumptive evidence of title; but where a sale is made and possession delivered to the purchaser, yet if by express agreement the title is to remain in the seller until the price be paid, the right of property is not vested in the purchaser until payment. And where the vendor has been guilty of no laches, he may reclaim the goods from a third party who took them in good faith and without notice.—*Parmlee v. Catherwood et al.*, 479.
4. *Statute of Frauds—Writing.*—A memorandum or note in writing, to take a case out of the statute of frauds, signed by the party to be charged, need not express the consideration, and need not be signed by the party seeking to enforce the contract. Where a bill is filed to enforce the specific performance of a contract in writing signed by the defendant, the contract is also signed by the plaintiff.—*Ivory v. Murphy*, 584.

CONVEYANCES.

1. *Power of Attorney.*—A. gave to B. a power of attorney to transact all his business, to collect all moneys due him, and to sell all his property real and personal; B., under the power, conveyed by deed of trust to C., as trustee, all the property and assets of A. in trust to secure and pay off the creditors and sureties of A. *Held*, that the power was properly executed, and that C. took a good title to the property.—*Lamy et al. v. Burr, Garn.*, 85.
2. *Execution—Sheriff's Deed.*—The deed made by the sheriff, upon a sale of land under execution, must show that the sheriff acted under a writ that was in force at the time he made the sale. When the sheriff endorsed upon an execution issued June 12, 1854, and returnable the first Monday of August, 1854, a levy made June 16, 1854, and then under the same writ made a sale on the 29th November, 1854; *held*, that no title passed by the deed. The endorsement of a levy upon the writ will not continue the execution in force, so that a sale can be made without a *venditioni exponas*. (*R. C.* 1855, p. 748, § 54.)—*Lackey v. Lubke*, 115.
3. *Uses and Trusts—Trustees.*—In consideration of the payment of the sum of \$500, M. conveyed land to nine persons as trustees of the Methodist Episcopal Church South, and to them and their successors in office lawfully appointed forever; one of the grantees died, and another removed from the State; *held*, that the Circuit Court had no authority to fill the vacancies and appoint new trustees under the act. (*R. C.* 1855, p. 1554, § 1.) *Held*, further, that if the consideration was paid by the persons constituting the church, that a court of equity would, upon the application of the church, fill the vacancies existing by appointing as trustees such persons as the church might select; but if the money was paid by the grantees, that then the legal title would belong to them and no appointment was needed.—*Draper et al. v. Minor et al.*, 290.
4. *Mortgage—Mistake.*—A conveyance intended as a security for a debt will not be treated as a mortgage in a court of law, unless the land be conveyed

CONVEYANCES—(Continued)

- to the creditor upon condition. A deed between A. and B. by which A. upon a consideration received from B. conveys to A. (himself) real estate, to be void upon payment of a debt due by A. to B., cannot be foreclosed as a mortgage in a court of law, although in a court of equity, upon proper allegations of mistake, the deed might be reformed and the equity of redemption foreclosed.—*Backliffe v. Seal et al.*, 817.
5. *Mortgage—Deed of Trust—Title.*—After the maturity of the debt secured by a mortgage or deed of trust of personal property, the mortgagee or trustee has the legal title and the right to recover possession. Although the trustee may have advertised and sold the property, he may sue for the possession, so that he may deliver the property sold to the purchaser.—*Lacey, Trustee, v. Giboney*, 820.
6. *Notice.*—A lease, to give notice of its terms to third parties, must be recorded.—*Carr v. Carr et al.*, 408.
7. *Administration.*—Under the act (R. C. 1885, 'p. 83, §§ 20, 21 & 25) it was not necessary that the deed of the administrator, conveying the land of the decedent under a sale made by order of the probate court, should recite the fact of the report of sale and its approval by the court. The deed reciting the order of sale and sale would be *prima facie* evidence of title, and it rests upon the party controverting the effect of the deed to prove affirmatively that the sale was not approved.—*Knowlton v. Smith*, 607. ✓
8. *Estoppel—Agreement.*—Parties agreeing upon a division line between their respective lands, are not estopped by such agreement if it be entered into under a mistake of facts, provided the rights of innocent third parties have not intervened in consequence thereof.—*Id.*

CORPORATIONS, MUNICIPAL.

See *REVENUE*, 5, 6, 7, 8, 9, 10.

1. *Counties.*—Corporations must act strictly within the limits of the powers conferred upon them by the act creating them. A county is a political division of the State, and a *quasi* corporation—performing in part the duties of the State, as an auxiliary of the government and a trustee for the people. An act of the Legislature investing the county court with power to do certain acts, necessarily implies the right to use the fit and appropriate means. Where, by an order of record, the county court ordered that a subscription be made for the stock of a railroad in accordance with an authority conferred by the charter of the company, a subsequent order of the court appointing an agent to enter the subscription upon the books of the company was a proper method for completing the subscription; the agent was a mere instrument executing an order. A subsequent ratification of the subscription by the court, under an act authorizing the same, would make the contract binding although it had been originally void.—*Han. & St. Jo. R.R. Co. v. Marion Co.*, 294.
2. *Estoppel.*—Where a county, acting under an authority it supposed to be valid, subscribed to the stock of a railroad company in good faith—issued its coupon notes in payment of such subscription—for a series of years voted such stock and paid its coupons—and such notes passed into the hands of innocent and *bona fide* purchasers,—it is estopped from asserting that such notes were illegally issued.—*Id.*

CORPORATIONS, MUNICIPAL—(*Continued.*)

3. *Damages—Action.*—A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done at its command, by its agents, in relation to a matter within the scope of the purpose for which it was incorporated. Where a municipal corporation opened a street through the lands of an individual without first having the land condemned and damages assessed in the manner provided by its charter, in an action against such corporation for the damages sustained the value of the land taken will be the measure of damages, and a judgment for such damages will work a dedication of the land to the corporation.—*Soulard v. City of St. Louis*, 546.
4. *Eminent Domain.*—There is a well recognized distinction as to liability between the acts of a municipal corporation in the discharge of such legislative functions as have been delegated to it by the State, and those acts done by a mere private corporation in the prosecution of enterprises for its own advantage or benefit. In the former case, no action can be maintained holding it responsible, where it is pursuing in a legal manner the power thus delegated to it.—*Soulard v. City of St. Louis*, 546.
5. *Counties.*—Counties are *quasi* corporations, created by the Legislature for purposes of public policy, and are not responsible for the neglect of duties enjoined on them, unless the action is given by statute.—*Reardon v. St. Louis County*, 555.

CORPORATIONS, RAILROAD.

1. *Damages—Loss of Life.*—Under the second section of the "Act for the better security of life and property," (R. C. 1855, p. 647,) the representatives of a servant can maintain an action against the master, if the death be occasioned by the negligence, unskillfulness, or criminal intent, of a fellow-servant. The burden of proof is upon the plaintiff to show negligence in such cases.—*Shultz v. Pacific Railroad*, 18.
2. *Trespasses—Enclosures.*—Railroad corporations are not required to fence in their tracks so as to prevent cattle from straying upon the adjoining fields. If they fail to fence their tracks and put up proper cattle-guards, they become liable to the owners of such stock as may be injured while straying upon the track, without any proof of negligence. (R. C. 1855, p. 487, § 52, and p. 647, § 5.) The object of the statute was the protection of the railroad, the safety of passengers and trains, and the prevention of accidents and injuries to cattle or other animals straying on the track.—*Clark's Adm'r v. Han. & St. Jo. R.R. Co.*, 202.
3. *Trespasses—Damages.*—Where a railroad corporation has had the right of way condemned and the damages assessed under the statute, they have power to construct their road through the land thus condemned, and to do all things that may be necessary and proper for that purpose; and, to the extent of the powers and rights thus acquired, neither the corporation nor the contractors can be held liable as trespassers or wrong-doers.—*Id.*
4. *Trespasses—Nuisance.*—In the absence of any negligence, unskillfulness or mismanagement in the construction of an embankment for the bed of a

CORPORATIONS, RAILROAD—(*Continued.*)

railroad over land through which there was no natural channel for the passage of water, the injury done by such embankment in causing the water to overflow the land of the adjoining proprietors must be considered as the natural consequence of what the corporation had acquired the lawful right to do by a condemnation of the land and the assessment of damages therefor, and such damages must be taken to have been included in the compensation assessed.—*Id.*

5. *Damages—Negligence.*—Negligence is the want of that care which men of common sense and common prudence ordinarily exercise in like employments. Railroad companies, owing to the dangerous character of the machinery and vehicles which they operate, will be held to the greatest caution and skill in the management of their business; but this will not exonerate others who are wanting in prudence or guilty of negligence.—*Kennedy v. North Mo. R.R. Co.*, 361.
6. *Damages—Carriers.*—The provision of the act (R. C. 1855, p. 647, § 2) relating to passengers dying from injuries occasioned by defects in the railroad or means of transportation, applies only to those transported or carried as passengers. Where the relation is properly that of master and servant, this particular clause of the act has no application. When the passenger by his own misconduct or negligence contributes to the injury, as by riding in the baggage car, contrary to the rules of the railroad, he cannot recover in case of injury. (R. C. 1855, p. 488, § 54.)—*Higgins, Guard., v. Han. & St. Jo. R.R. Co.*, 418.

COURTS.

1. *Jurisdiction.*—The Circuit Court has concurrent jurisdiction with justices of the peace in actions on contracts, only in cases where the amount exceeds fifty and is less than ninety dollars. (R. C. 1855, p. 583, § 8.)—*Murphy et al. v. Campbell*, 110.
2. *Practice—Recorder of Hannibal.*—By the act of 1851, p. 335, Art VIII., in suits brought before the recorder of the city of Hannibal for the recovery of the possession of personal property, the practice must conform to that prescribed in suits brought in the Circuit Courts, and the case must be tried upon written pleadings.—*Summons v. Austin*, 307.
3. *St. Charles Probate Court—Appeal.*—Under the provisions of the act establishing the St. Charles Probate Court, (Sess. Acts 1859-60, p. 13, § 3,) an appeal lies from that court to the Supreme Court.—*Crow et als. v. Weidner*, 412.
4. *Jurisdiction—Justices' Courts—Law Commissioner.*—Justices of the peace and the Law Commissioner's Court for St. Louis county have no jurisdiction to enforce a lien upon real estate to secure the payment of a special tax for the improvement of streets and alleys, under the charters and ordinances of the City of St. Louis.—*City of St. Louis to use, &c., v. Rudolph*, 465.

COUNTIES.

See CORPORATIONS, MUNICIPAL, 1, 9. COURTS, 1, 3, 4.

CRIMES.

1. *Robbery—Larceny—Criminal Practice.*—A party indicted for the crime of robbery in the first degree (R. C. 1855, p. 574, § 20) cannot be convicted of robbery in the second degree (R. C. 1855, p. 594, § 21), but may be convicted of larceny. It is of the essence of robbery in the first degree, that the violence or fear of injury should be present and immediate to the person, and that the property should be actually taken from the owner's person, or in his presence, and against his will.—*State v. Jenkins*, 872.
2. *Slavery—Larceny.*—The possession of the slave is the possession of the master. An indictment, therefore, charging the defendant with purchasing from a slave, property belonging to the master, is bad on motion in arrest.—*State v. Edwards*, 394.

D

DAMAGES.

1. *Loss of Life.*—Under the second section of the "Act for the better security of life and property," (R. C. 1855, p. 647,) the representatives of a servant can maintain an action against the master, if the death be occasioned by the negligence, unskillfulness or criminal intent of a fellow-servant. The burden of proof is upon the plaintiff to show negligence in such cases.—*Schultz v. Pacific Railroad*, 13.
2. *Railroads—Trespasses.*—Where a railroad corporation has had the right of way condemned and the damages assessed under the statute, they have power to construct their road through the land thus condemned, and to do all things that may be necessary and proper for that purpose; and, to the extent of the powers and rights thus acquired, neither the corporation nor the contractors can be held liable as trespassers or wrong-doers.—*Clark's Adm'r v. Han. & St. Jo. R.R. Co.*, 202.
3. *Railroads—Negligence.*—Negligence is the want of that care which men of common sense and common prudence ordinarily exercise in like employments. Railroad companies, owing to the dangerous character of the machinery and vehicles which they operate, will be held to the greatest caution and skill in the management of their business; but this will not exonerate others who are wanting in prudence or guilty of negligence.—*Kennedy v. North Mo. R.R. Co.*, 351.
4. *Carriers—Railroads.*—The provision of the act (R. C. 1855, p. 647, § 2) relating to passengers dying from injuries occasioned by defects in the railroad or means of transportation, applies only to those transported or carried as passengers. Where the relation is properly that of master and servant, this particular clause of the act has no application. (See *ante* *Schultz v. Pacific R.R.*, 13.) When the passenger by his own misconduct or negligence contributes to the injury, as by riding in the baggage car, contrary to the rules of the railroad, he cannot recover in case of injury. (R. C. 1855, p. 438, § 54.)—*Higgins, Guard., v. Han. & St. Jo. R.R. Co.*, 418.
5. *Limitations.*—Suits for damages under the 2d section of the "Act for the better security of life," &c. (R. C. 1855, p. 647), must be commenced within one year after the cause of action accrues. If the wife of the deceased fail to sue within six months, the minor child has not twelve months thereafter within which to sue.—*Kennedy v. Burrier*, 123.

DAMAGES—(Continued.)

6. *Trespass*.—"Exemplary damages" would seem to mean, in the ordinary and proper sense of the words, such damages as would be a good round compensation, and an adequate recompense for the injury sustained, and such as might serve for a wholesome example to others in like cases. Where the defendants, forming part of a body of armed men, forcibly broke and entered the plaintiff's store, putting him in bodily fear, and took and carried away a large portion of the plaintiff's stock of goods, injuring his business, the mere value of the goods taken with interest thereon is not the proper measure of damages.—*Freidenheit v. Edmundson et als.*, 226.
7. *Action—Negligence*.—Where the defendant has used proper care and caution to prevent an accident, and has been guilty of no negligence, he will not be responsible for an injury caused by such accident.—*Boland and wife v. Missouri R.R. Co.*, 484.
8. *Exemplary Damages*.—To authorize the giving of exemplary damages, malice, violence, oppression, or wanton recklessness, must be proven.—*Kennedy v. North Mo. R.R. Co.*, 351.
9. *Corporations—Action*.—A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done at its command, by its agents, in relation to a matter within the scope of the purpose for which it was incorporated. Where a municipal corporation opened a street through the lands of an individual without first having the land condemned and damages assessed in the manner provided by its charter, in an action against such corporation for the damages sustained the value of the land taken will be the measure of damages, and a judgment for such damages will work a dedication of the land to the corporation.—*Soulard v. City of St. Louis*, 546.

DEPOSITIONS.

1. *Practice*.—Where the deposition of a witness, residing more than forty miles from the place of trial, was taken, it may be read in evidence, although the witness may have attended at the court, if he depart before the trial without the consent or collusion of the party offering the deposition.—*Huthsing v. Maus*, 101.
2. *Witness—Contradiction—Evidence*.—Where an attempt is made to impeach a witness by showing that he has made statements differing from his testimony, the witness must have his attention called to the time, place and circumstances of the statements made and the person to whom made, that he may have the opportunity to explain the contradiction. If the attempt be made to impeach his testimony by statements made after the taking of his deposition, a new commission must be taken out, and he must be interrogated as to his contradictory statements before his testimony can be impeached.—*Gregory v. Cheatham et al.*, 155.
3. *Notice*.—If a party appear at the taking of the deposition and cross-examine the witness, he cannot afterward object to the sufficiency of the notice.—*Goodfellow v. Landis*, 168.

E**EJECTMENT.**

See **LANDS AND LAND TITLES.**

1. *Confirmation—Title*.—A plaintiff in ejectment who shows no title in himself

EJECTMENT—(Continued.)

- cannot be permitted to controvert the *prima facie* title of the defendant under a confirmation and official survey by the United States.—Robbins et als. v. Eckler et als., 494.
2. *Execution—Sheriff's Deed.*—The deed made by the sheriff, upon a sale of land under execution, must show that the sheriff acted under a writ that was in force at the time he made the sale. When the sheriff endorsed upon an execution issued June 12, 1854, and returnable the first Monday of August, 1854, a levy made June 16, 1854, and then under the same writ made a sale on the 29th November, 1854; *held*, that no title passed by the deed. The endorsement of a levy upon the writ will not continue the execution in force, so that a sale can be made without a *venditioni exponas*. (R. C. 1855, p. 748, § 54.)—Lackey v. Lubke, 115.
3. *Conveyance.*—Under the act (R. C. 1835, p. 88, §§ 20, 21 & 25) it was not necessary that the deed of the administrator, conveying the land of the decedent under a sale made by order of the probate court, should recite the fact of the report of sale and its approval by the court. The deed reciting the order of sale and sale would be *prima facie* evidence of title, and it rests upon the party controverting the effect of the deed to prove affirmatively that the sale was not approved.—Knowlton v. Smith, 507.
4. *Estoppel—Conveyance—Agreement.*—Parties agreeing upon a division line between their respective lands, are not estopped by such agreement if it be entered into under a mistake of facts, provided the rights of innocent third parties have not intervened in consequence thereof.—*Id.*
5. *New Madrid Location.*—A defendant claiming title under a New Madrid location is in a position to dispute the correctness and validity of a *prima facie* superior title of the plaintiff under a confirmation by the act of June 18, 1812.—Clark v. Hammerle, 620.

EQUITY.

1. *Practice—Judgment—Injunction.*—A defendant in a suit who has been properly served with process, and has failed to appear, cannot enjoin the judgment entered against him, unless he show not only that it is inequitable to execute such judgment against him, but also that he could not have availed himself of his defence at law, or that he was prevented by fraud or accident, without any fault or negligence on his part.—George v. Tutt et als., 141.
2. *Vendors and Purchasers—Estoppel.*—An outstanding title purchased by a vendee of land in possession under a title bond, enures to the benefit of the vendor. In a suit upon the notes given for the consideration, the vendee cannot defeat a recovery upon the ground of failure of title, but will be allowed the cost and expenses of his purchase of such outstanding title.—Ash, Adm'r, v. Holder, 163.
3. *Lands—Pre-emptions.*—The act of Congress concerning pre-emptions gives the officers of the Land Department the right to determine all questions arising between different settlers. The fee of the lands in this State being originally in the Government, and Congress being vested exclusively with the primary disposal of the soil, the presumption is in favor

EQUITY—(*Continued.*)

of the action of the officers designated to execute the laws made for that purpose. Where the officers are vested with discretionary authority, their acts are not subject to the revision of our courts; but when they act without authority of or in violation of law, then jurisdiction will be assumed. A patent carries the legal title, and the presumption is that all necessary preliminary steps have been taken, and in favor of its validity; and the burden of proof is upon him who impeaches it.—*Hill v. Miller*, 182.

4. *Practices—Pleading—Fraud.*—A petition which seeks to set aside a patent and to hold the patentee as trustee, upon the ground of fraud, must be as definite and precise as was formerly required on a bill in chancery. It is not sufficient to make a general allegation of fraud without any other specifications of the acts which constituted it.—*Id.*
5. *Conveyance—Mortgage—Mistake.*—A conveyance intended as a security for a debt will not be treated as a mortgage in a court of law, unless the land be conveyed to the creditor upon condition. A deed between A. and B. by which A. upon a consideration received from B. conveys to A. (himself) real estate, to be void upon payment of a debt due by A. to B., cannot be foreclosed as a mortgage in a court of law; although, in a court of equity, upon proper allegations of mistake, the deed might be reformed and the equity of redemption foreclosed.—*Rackliffe v. Seal et al.*, 317.
6. *Practice—Evidence—Fraud.*—A creditor claiming title to land by virtue of a purchase under his judgment and a sale by the sheriff, and seeking to set aside a prior conveyance of the debtor on the ground of fraud, must show that he has acquired the title by a sheriff's deed, if the title be put in issue by the pleadings.—*Hiney v. Thomas et al.*, 377.
7. *Mortgagor—Substitution.*—A. executed a deed of trust, in the nature of a mortgage, to secure a debt, and subsequently by deed poll conveyed the property to B., reciting in the conveyance that part of the consideration was the payment of the encumbrance by B.; *held*, that B. could not be considered as a mortgagor, and that a personal judgment against B. for the mortgage debt was erroneous. (*R. C.* 1855, p. 1089, §§ 10, 14.)—*Mason v. Barnard et als.*, 384.
8. *Uses and Trusts—Purchasers.*—The trustee holds the legal estate for benefit of the *cestui qui trust*, and no act of his can prejudice the beneficiary; but if the trustee be in actual possession of an estate and sell it to an innocent purchaser, for a valuable consideration, without any notice of the trust, the purchaser will be protected.—*Grove v. Heirs of Robards et al.*, 523.
9. *Fraud—Notice—Conveyances.*—The heirs of the grantor in a deed of trust in the nature of a mortgage, who has by fraudulent representations induced the trustee to release the property without the knowledge and consent of the *cestui qui trust*, take the estate with full notice, and stand in the same position as their ancestor.—*Id.*
10. *Contract—Statute of Frauds—Writing.*—A memorandum or note in writing, to take a case out of the statute of frauds, signed by the party to be charged, need not express the consideration, and need not be signed by the party seeking to enforce the contract. Where a bill is filed to enforce the specific performance of a contract in writing signed by the defendant, the contract is also signed by the plaintiff.—*Ivory v. Murphy*, 584.

EQUITY—(Continued.)

11. *Contract—Specific Performance.*—The specific performance of a contract for the sale of land, is not granted as a mere matter of right by the court to which it is addressed, but from a just and reasonable discretion, to be governed by sound legal rules and principles.—*Id.*
12. *Securities—Substitution.*—P. & Co., at New Orleans, gave to C., at Saint Louis, letters of credit authorizing him to draw bills of exchange from time to time upon them. As security for these advances to be thus made, C. gave to P. & Co. a deed of trust upon real estate, providing that if any part of the bills accepted by P. & Co., or thereafter to be accepted, should remain unpaid by C. on the 31st December, 1860, that the deed of trust might be foreclosed. This deed was recorded, and C. drew his bills and had them discounted. P. & Co. subsequently released part of the real estate covered by the deed of trust, and this release was also recorded, and the land conveyed as security for other parties. Upon a bill filed by the holders of the bills drawn by C., accepted by P. & Co., and protested for non-payment, P. & Co. having become insolvent, to set aside such release, and to enforce the security in favor of the holder: *Held*, that by its terms the deed of trust was given to secure the balance only of such bills as P. & Co. might have paid for C.; that the bills were discounted upon the faith of the letters of credit, and that the holders thereof had no interest in the property released, more especially as against parties who had innocently acquired rights under the release. *Seem*—That P. & Co., being the acceptors of the bills and the principal debtors, a suit might have been sustained against them by the holders of the bills, to have the security while in their hands assigned for the benefit of the creditors. *Held also*, that the recording of the deed of trust could not impart notice to subsequent creditors of any equitable rights in the holders of the bills, as it was not given for their benefit.—*St. Louis Build. & Sav. Ass'n v. Clark and wife et als.*, 601.

ERROR.

1. *Practice—Irregularity.*—Where the plaintiff in the suit dies, the administrator can be substituted in his place only by the voluntary appearance of the defendant, or by the service upon him of a *scire facias*. To enter the appearance of the administrator and give judgment against defendant without such appearance or *scire facias*, is erroneous.—*Harkness, Adm'r, v. Austin et al.*, 47.
2. *Practice—Irregularity—Limitations.*—The party has three years within which to move to set aside a judgment for irregularity.—*Id.*
3. *Judgment—Irregularity—Appearance.*—*Smith's Adm'r v. Rollins*, 25 Mo. 408, affirmed. A party appearing in court to move to set aside a judgment against him for irregularity, is in court for that purpose only.—*Lincoln v. Hilbus*.—149.
4. *Judgment.*—A judgment at law is an entirety—good as to all, or bad as to all the defendants. A judgment rendered jointly against the maker and endorser of a promissory note, in a suit in which the maker was not served with process, is erroneous as against the endorser, and will be reversed upon writ of error or appeal.—*Covenant Mut. Life Insur. Co. v. Clover et al.*, 392.

ERROR—(Continued.)

5. *Practice—Motion for New Trial—Criminal Practice.*—Such errors as appear upon the face of the record, or such as may be taken advantage of by a motion in arrest or by a writ of error, will, in criminal cases, be noticed in the Supreme Court as a matter of course; but as to exceptions taken in the progress of the trial, and as to motions for a new trial and in arrest which become part of the record only by bill of exceptions, the same rule governs in criminal as in civil cases.—*State v. Marshall*, 400.
6. *Practice—New Trial.*—No exception can be taken in the Supreme Court, upon appeal or writ of error, to matters not appearing upon the face of the record, unless they are made part of the record by bill of exceptions and have been expressly decided by the court below, which must appear by the filing and overruling a motion for a new trial, and exceptions thereto preserved. It is not required by the statute (R. C. 1855, p. 1286, § 6) that the motion for a new trial should specify the reasons for which it is made, but that is the better practice. By the Practice Act of 1849 it was not necessary that the exceptions should be saved by a motion for a new trial. (*Fine v. Rogers*, 15 Mo. 315; *Wagner v. Jacoby*, 26 Mo. 530; *Prince v. Cole*, 28 Mo. 486; *Gray v. Healep*, 33 Mo. 243, commented upon.)—*Id.*

ESTOPPEL.

1. *Corporations—Counties.*—Corporations must act strictly within the limits of the powers conferred upon them by the act creating them. A county is a political division of the State, and a *quasi* corporation—performing in part the duties of the State, as an auxiliary of the government and a trustee for the people. An act of the Legislature investing the county court with power to do certain acts, necessarily implies the right to use the fit and appropriate means. Where, by an order of record, the county court ordered that a subscription be made for the stock of a railroad in accordance with an authority conferred by the charter of the company, a subsequent order of the court appointing an agent to enter the subscription upon the books of the company was a proper method for completing the subscription; the agent was a mere instrument executing an order. A subsequent ratification of the subscription by the court, under an act authorizing the same, would make the contract binding although it had been originally void.—*Han. & St. Jo. R.R. Co. v. Marion County*, 294.
2. *Corporations, Municipal.*—Where a county, acting under an authority it supposed to be valid, subscribed to the stock of a railroad company in good faith—issued its coupon notes in payment of such subscription—for a series of years voted such stock and paid its coupons—and such notes passed into the hands of innocent and *bona fide* purchasers,—it is estopped from asserting that such notes were illegally issued.—*Id.*
3. *Dedication.*—The dedication of land to public uses can be made only by the owner of the fee. The making and recording of a plat of a town, upon which plat certain portions of the land are marked as public, is a grant of such lands to public use, and all persons claiming by subsequent grant through the party thus filing such plat are estopped from denying the title of the public. But a party in possession of such lands, not thus claiming title, is not estopped from denying the title of the party filing the plat.

ESTOPPEL—(Continued.)

(See S. C. 15 Mo. 634.)—*City of Hannibal v. Heirs & Adm'r of Draper*, 332.

4. *Judgment*.—*Hempstead v. Hempstead's Administrator*, affirmed. Where no action can be sustained against the administrator, none can be maintained against his securities; and a judgment in favor of the administrator is a bar to a suit, upon the same subject matter, against the securities, as they are in privity with him.—*State to use, &c., v. Coste et al.*, 437.
5. *Sale*.—A party claiming to be the owner of goods by purchase and delivery, is estopped by the levy of an execution in his favor upon the same goods as the property of the defendant in the execution.—*Langsdorf et al. v. Field et als.* 440.
6. *Conveyance—Agreement*.—Parties agreeing upon a division line between their respective lands, are not estopped by such agreement if it be entered into under a mistake of facts, provided the rights of innocent third parties have not intervened in consequence thereof.—*Knowlton v. Smith*, 507. ✓

EVIDENCE.

1. *Stamp*.—Under the act of Congress of March 3, 1863, a note executed before June 1, 1863, is admissible in evidence if the proper stamp be affixed before it is thus offered.—*Day v. Baker et al.*, 125.
2. *Protest—Endorsers*.—To secure the liability of the endorsers of a bill of exchange, or negotiable promissory note, demand of payment must be made of all the makers, and notice of demand and refusal must be given to the endorsers. A notary's protest, which stated "that he presented the same at the office of the makers and was refused payment," without stating from whom payment was demanded, does not show a proper demand and refusal of payment. In a suit against endorsers, such protest may be properly excluded as evidence. A demand of payment may be made by the holder of the note or bill, or any agent for him.—*Nave v. Richardson et als.*, 180.
3. *Presumption—Courts*.—All proper presumptions will be indulged in favor of the judgments of courts of record, and they must appear clearly erroneous before they will be disturbed.—*State v. Rogers et al.*, 188.
4. *Witness—Contradiction*.—Where an attempt is made to impeach a witness by showing that he has made statements differing from his testimony, the witness must have his attention called to the time, place and circumstances of the statements made and the person to whom made, that he may have the opportunity to explain the contradiction. If the attempt be made to impeach his testimony by statements made after the taking of his deposition, a new commission must be taken out, and he must be interrogated as to his contradictory statements before his testimony can be impeached.—*Gregory v. Cheatham*, 155.
5. *Judicial Notice*.—Of the public and official acts of the sovereign political power in the State, or of the executive or judicial departments of the Government, the Circuit Courts are bound to take judicial notice.—*Thomas v. Mead et al.*, 282.

EVIDENCE—(Continued.)

6. *Practice—Objections.*—Objections made to the admission of evidence, without specifying the reasons therefor, will not be noticed in the appellate court. *Han. & St. Jo. R.R. Co. v. Marion County*, 294.
7. *Hearsay.*—The statements made by one who is himself a competent witness are not admissible in evidence. The declarations made by one in possession of property, against his interest, are admissible in evidence against himself and those claiming under him.—*Wood v. Hicks*, 326.
8. *Practice—Fraud.*—A creditor claiming title to land by virtue of a purchase under his judgment and a sale by the sheriff, and seeking to set aside a prior conveyance of the debtor on the ground of fraud, must show that he has acquired the title by a sheriff's deed, if the title be put in issue by the pleadings.—*Hiney v. Thomas et al.*, 377.
9. *Copy.*—Before a copy of an instrument can be admitted in evidence, it must be shown that proper means have been taken to procure the original, and its absence duly accounted for.—*Carr v. Carr et al.*, 408.
10. *Hearsay.*—The statements of one who is a competent witness at the trial are not admissible in evidence. The defendant in an attachment suit is a competent witness upon an interpleader for the property attached.—*Langedorf et al. v. Field et al.*, 440.
11. *City of St. Louis—Special Tax.*—By the provisions of the act of Jan. 16, 1860 (Sess. Acts 1859–60, p. 382), the special tax bill, certified by the city engineer, is *prima facie* evidence of the liability of the person therein named as the owner of the property.—*City of St. Louis to use, &c., v. Oeters*, 456.
12. *Confirmation—Out-boundary Survey.*—The out-boundary survey of a town, including the town with its common-field lots, out-lots, and commons, is no evidence of the location, extent and boundary of the commons, nor of any private lot marked on the plat.—*Robbins et al. v. Eckler et al.*, 494.
13. *Lands and Land Titles—Confirmation.*—Certified copies from the registry of claims proved before the Recorder of land titles under the act of Congress of May 26, 1824, or from the registry of certificates of confirmation or list of claims are proved, or of official survey by the Surveyor General of the lots so proved, or a certificate of confirmation issued by the Recorder of land titles upon such survey, are admissible in evidence as *prima facie* evidence of title to the lot confirmed.—*Clark v. Hammer*, 620.

EXECUTIONS.

1. *Sheriff's Deed.*—The deed made by the sheriff, upon a sale of land under execution must show that the sheriff acted under a writ that was in force at the time he made the sale. When the sheriff endorsed upon an execution issued June 12, 1854, and returnable the first Monday of August, 1854, a levy made June 16, 1854, and then under the same writ made a sale on the 29th November, 1854; *held*, that no title passed by the deed. The endorsement of a levy upon the writ will not continue the execution in force, so that a sale can be made without a *venditioni exponas*. (R. C. 1855, p. 748, § 54.) —*Lackey v. Lubke*, 115.
2. *Garnishee.*—The defendant in the execution stands to the garnishee in the

EXECUTIONS—(Continued.)

- relation of creditor to debtor; and the plaintiff in the execution, in order to recover, must prove the indebtedness in the same manner as the defendant would be compelled to do had he issued the garnishee.—*Karnes v. Pritchard, Garn.*, 185.
3. *Justices' Courts—Garnishee.*—The garnishee in an execution from a justice of the peace answering, "that he was indebted to the defendant, but could not then state the amount due, as he had a set-off," was allowed time to file an additional answer; *held*, that allowing time was within the discretion of the justice.—*Id.*
 4. *Garnishee.*—The pendency of a suit against the garnishee by the defendant in the attachment or execution will not relieve the garnishee from his liability under the garnishment. After being summoned as garnishee he cannot pay the money due to the attachment or judgment debtor.—*Lieber v. St. Louis Agr. & Mech. Ass'n, Garn.*, 882.
 5. *Justices' Courts—Constable.*—A constable sued before a justice for failing to return an execution within the proper time, may, upon a proper case made, be allowed to amend his return so as to show that the execution was returned in time, although suit may have been commenced against himself and his securities.—*Corby, Assignee, &c., v. Burns et al.*, 194.

F

FIXTURES.

1. *Landlord.*—As between vendor and vendee, machinery does not pass with the freehold; and as between landlord and tenant, the tenant may remove any improvement he may make, before he surrenders the premises, provided it can be removed without injury to the freehold.—*Lacey, Trustee, v. Giboney*, 320.

FRAUDS.

1. *Practice—Pleading—Equity.*—A petition which seeks to set aside a patent and to hold the patentee as trustee, upon the ground of fraud, must be as definite and precise as was formerly required on a bill in chancery. It is not sufficient to make a general allegation of fraud without any other specifications of the acts which constituted it.—*Hill v. Miller*, 182.
2. *Practice—Evidence.*—A creditor claiming title to land by virtue of a purchase under his judgment and a sale by the sheriff, and seeking to set aside a prior conveyance of the debtor on the ground of fraud, must show that he has acquired the title by a sheriff's deed, if the title be put in issue by the pleadings.—*Hiney v. Thomas et al.*, 377.
3. *Judgment.*—Judgment set aside as in fraud of creditors.—*Wood v. Hicks*, 326.
4. *Uses and Trusts—Purchasers.*—The trustee holds the legal estate for benefit of the *cestui qui trust*, and no act of his can prejudice the beneficiary; but if the trustee be in actual possession of an estate and sell it to an innocent purchaser for a valuable consideration, without any notice of the trust, the purchaser will be protected.—*Grove v. Heirs of Robards et al.*, 523.

FRAUDS—(Continued.)

6. *Notice—Conveyances.*—The heirs of the grantor in a deed of trust in the nature of a mortgage, who has by fraudulent representation induced the trustee to release the property without the knowledge and consent of the *cestui que trust*, takes the estate with full notice, and stand in the same position as their ancestor.—*Id.*

G

GOVERNOR.

See OFFICERS.

GUARDIAN AND WARD.

1. *Administration—Securities.*—The securities of a curator who has committed a breach of his bond by converting the moneys of his ward to his own use, will be held liable upon their undertaking although the curator may have subsequently given an additional bond, and have made settlements carrying down the balance due his ward so as to make the securities upon the new bond also liable. A judgment against the securities in the second bond for the whole balance due at the last settlement of the curator, will not discharge the securities upon the first bond from their liability for any acts done before the second bond was given. There can be but one satisfaction, but the ward may pursue all his remedies until he has been fully paid. *Quare* as to the liability of the securities upon the different bonds to contribution.—*State* to use *Drury v. Drury et al.*, 281.
2. *Practice—Infant.*—A petition by an infant must show that the plaintiff is an infant, and sues by a guardian, or next friend legally appointed, or it will be bad on demurrer.—*Higgins, Guard., v. Han. & St. Jo. R.R. Co.*, 418.
3. *Practice—Infant.*—Where an infant sues without procuring the appointment of a "next friend," as required by the statute, the defendant may take advantage of the defect by demurrer or by answer; unless he do so the defect is waived, (R. C. 1855, p. 1231, § 10,) and the defendant cannot move in arrest of judgment. (R. C. 1855, p. 1255, § 19.)—*Jones v. Steele*, 324.
4. *Practice—Amendment.*—After a judgment in favor of an infant plaintiff without the appointment of a "next friend," at the commencement of the suit, the court may upon his application appoint a next friend, and approve his bond, that the money recovered be secured to the infant.—*Id.*

H

HABEAS CORPUS.

1. *Practice—Jurisdiction.*—At the hearing upon a *habeas corpus* the court has authority to adjudge only upon the case of the person alleged to be unlawfully restrained of his liberty, and to remand or discharge the person so restrained; beyond this it has no authority to determine the rights of the parties. Upon a petition for a *habeas corpus*, the Circuit Court has no power or jurisdiction to determine matters of guardianship, the appointment of trustees, the disposition of the property or moneys of the parties, or the making

HABEAS CORPUS—(Continued.)

of provision for the support of the children placed in the custody of the mother, or the support of a wife living apart from her husband.—*Ferguson v. Ferguson et al.*, 197.

2. *Practice—Appeal.*—From the decision of a court remanding or discharging a prisoner brought before it upon a writ of *habeas corpus*, no appeal lies.—*Id.*

HIGHWAYS.

1. *Dedication—Estoppel.*—The dedication of land to public uses can be made only by the owner of the fee. The making and recording of a plat of a town, upon which plat certain portions of the land are marked as public, is a grant of such lands to public use, and all persons claiming by subsequent grant through the party thus filing such plat are estopped from denying the title of the public. But a party in possession of such lands, not thus claiming title, is not estopped from denying the title of the party filing the plat.—*City of Hannibal v. Draper's heirs et al.*, 382.

I**INJUNCTION.**

1. *Practice—Judgment.*—A defendant in a suit who has been properly served with process, and has failed to appear, cannot enjoin the judgment entered against him, unless he show not only that it is inequitable to execute such judgment against him, but also that he could not have availed himself of his defence at law, or that he was prevented by fraud or accident, without any fault or negligence on his part.—*George v. Tutt et als.*, 141.

J**JUDGMENT.**

See PRACTICE, CIVIL.

1. *Irregularity—Appearance.*—*Smith's Adm'r v. Rollins*, 25 Mo. 408, affirmed. A party appearing in court to move to set aside a judgment against him for irregularity, is in court for that purpose only.—*Lincoln v. Hilbus*, 149.
2. *Practice—Irregularity—Limitations.*—The party has three years within which to move to set aside a judgment for irregularity.—*Dysart's Adm'r v. Austin et al.*, 47.
3. *Error.*—A judgment at law is an entirety—good as to all, or bad as to all the defendants. A judgment rendered jointly against the maker and endorser of a promissory note, in a suit in which the maker was not served with process, is erroneous as against the endorser, and will be reversed upon writ of error or appeal.—*Covenant Mut. Life Ins. Co. v. Clover et al.*, 392.
4. *Estoppel.*—*Hempstead v. Hempstead's Administrator*, affirmed. Where no action can be sustained against the administrator, none can be maintained against the securities; and a judgment in favor of the administrator is a bar to a suit, upon the same subject matter, against the securities, as they are in privity with him.—*State to use, &c., v. Coste et al.*, 437.
5. *Fraud.*—Judgment set aside as in fraud of creditors.—*Wood v. Hicks*, 326.
7. *Practice—Evidence—Fraud.*—A creditor claiming title to land by virtue of

JUDGMENT—(Continued.)

a purchase under his judgment and a sale by the sheriff, and seeking to set aside a prior conveyance of the debtor on the ground of fraud, must show that he has acquired the title by a sheriff's deed, if the title be put in issue by the pleadings.—*Hiney v. Thomas et al.*, 377.

JURISDICTION.

See COURTS. EQUITY. PRACTICE.

1. *Courts*.—The Circuit Court has concurrent jurisdiction with justices of the peace in actions on contracts, only in cases where the amount exceeds fifty and is less than ninety dollars. (R. C. 1856, p. 633, § 8.)—*Murphy v. Campbell*, 110.
2. *St. Charles Probate Court—Appeal*.—Under the provisions of the act establishing the St. Charles Probate Court, (Sess. Acts 1859–60, p. 13, § 3,) an appeal lies from that court to the Supreme Court.—*Crow et als. v. Weidner*, 412.
3. *Jurisdiction—Justices' Courts—Law Commissioner*.—Justices of the peace and the Law Commissioner's Court for St. Louis county have no jurisdiction to enforce a lien upon real estate to secure the payment of a special tax for the improvement of streets and alleys, under the charters and ordinances of the City of St. Louis.—*City of St. Louis to use, &c., v. Rudolph*, 465.
4. *Habeas Corpus—Practice*.—At the hearing upon a *habeas corpus*, the court has authority to adjudge only upon the case of the person alleged to be unlawfully restrained of his liberty, and to remand or discharge the person so restrained; beyond this it has no authority to determine the rights of the parties. Upon a petition for a *habeas corpus*, the Circuit Court has no power or jurisdiction to determine matters of guardianship, the appointment of trustees, the disposition of the property or moneys of the parties, or the making of provision for the support of the children placed in the custody of the mother, or the support of a wife living apart from her husband.—*Ferguson v. Ferguson et al.*, 197.
5. *Prohibition—Supreme Court*.—The Supreme Court has jurisdiction and power to issue a writ of prohibition; it is invested by the Constitution with a general superintending control over all inferior courts in the State, and with original jurisdiction to issue writs of *Habeas Corpus*, *Mandamus*, *Quo warrant*, *Certiorari*, and other original remedial writs, and to hear and determine the same. In respect of pre-eminence and power, it holds a position under the Constitution analogous to that of the King's Bench in England, and will keep all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined before it, or prohibit their progress by law. A "Prohibition" is an original remedial writ, and was provided by the Common Law as a remedy for encroachment of jurisdiction. It is directed to the judge and parties to a suit in an inferior jurisdiction, upon the ground that they have illegally assumed or transgressed the limits of their jurisdiction.—*Thomas v. Mead et al.*, 232.
6. *Practice*.—Objections to the jurisdiction of the court are not waived by

JURISDICTION—(*Continued.*)

omitting to take advantage of them by demurrer or answer, and the exception may be taken on the motion for a new trial.—*Lindell's Adm'r v. Han. & St. Jo. R.R. Co.*, 548.

JUSTICES' COURTS.

1. *Jurisdiction—Law Commissioner.*—Justices of the peace and the Law Commissioner's Court for St. Louis county have no jurisdiction to enforce a lien upon real estate to secure the payment of a special tax for the improvement of streets and alleys, under the charters and ordinances of the City of St. Louis.—*City of St. Louis to use, &c., v. Rudolph*, 465.
2. *Attachment—Garnishee.*—The garnishee in an execution from a justice of the peace answering, "that he was indebted to the defendant, but could not then state the amount due, as he had a set-off," was allowed time to file an additional answer; *held*, that allowing time was within the discretion of the justice.—*Karnes v. Pritchard, Garn.*, 185.
3. *Execution—Constable.*—A constable sued before a justice for failing to return an execution within the proper time, may, upon a proper case made, be allowed to amend his return so as to show that the execution was returned in time, although suit may have been commenced against himself and his securities.—*Corby, Assignee, &c., v. Burns et al.*, 194.

L

LANDLORDS AND TENANTS.

1. *Attachment.*—The removal by a tenant of a small portion of his furniture for temporary use elsewhere, the tenant not intending to leave the premises, will not authorize the landlord to sue out an attachment against the tenant under the act of "Landlords and Tenants." (*R. C. 1855, p. 1015, § 26.*)—*Kinear v. Shands*, 879.
2. *Rents.*—Where the military authorities took possession of demised premises, and held possession of the same without the consent of the lessee after the expiration of the term: *Held*, that the lessee was not liable for rent of the premises after the expiration of the term although he had received from the Government the rents accruing during the term.—*Constant v. Abell*, 174.

LANDS AND LAND TITLES.

See CONVEYANCES. EJECTMENT. EQUITY. ESTOPPEL. LIMITATIONS.

1. *Pre-emptions—Equity.*—The act of Congress concerning pre-emptions gives the officers of the Land Department the right to determine all questions arising between different settlers. The fee of the lands in this State being originally in the Government, and Congress being vested exclusively with the primary disposal of the soil, the presumption is in favor of the action of the officers designated to execute the laws made for that purpose. Where the officers are vested with discretionary authority, their acts are not subject to the revision of our courts; but when they act without authority of or in violation of law, then jurisdiction will be assumed. A patent carries the legal title, and the presumption is that all necessary preliminary steps have been taken, and in favor of its validity; and the burden of proof is upon him who impeaches it.—*Hill v. Miller*, 182.

LANDS AND LAND TITLES—(Continued.)

2. *Practice—Pleading—Fraud.*—A petition which seeks to set aside a patent and to hold the patentee as trustee, upon the ground of fraud, must be as definite and precise as was formerly required on a bill in chancery. It is not sufficient to make a general allegation of fraud without any other specifications of the acts which constituted it.—*Id.*
3. *Confirmation.*—*Papin v. Hines*, 23 Mo. 274, affirmed.—*Papin et al. v. Ryan*, 406.
4. *Confirmations—Enurement.*—A confirmation by the board of commissioners, under act of Congress of July 4, 1836, to D., or his legal representatives, enures to the benefit of those who show themselves to derive title through D., and not to the persons presenting the claim. (*Hogan v. Page*, 22 Mo. 55, and 32 Mo. 68, affirmed.)—*Connoyer et al. v. Washington University*, 481.
5. *Confirmation—Commons—Survey—Title.*—The act of Congress of June 13, 1812, confirming to the inhabitants of the village of St. Charles their commons, together with an approved official survey by authority of the United States, are equivalent to a patent of the tract of land surveyed as commons; but no such effect can be given to the survey of the commons made by Antoine Soulard, March 2, 1804. The act of Congress did not purport nor intend to confirm claims to commons which existed on March 2, 1804, but only such as existed in fact prior to Dec. 20, 1803. In the absence of any official survey by the United States, the only way in which a title to commons under the act of June 13, 1812, can be shown, is by proof of some grant, concession, survey or actual possession, claim or user of some definite tract of land as commons prior to the 20th Dec., 1803. Without such evidence, there can be no title to commons under that act where no official survey is shown.—*Robbins et als. v. Eckler et als.*, 494.
6. *Confirmation—Out-boundary Survey.*—The out-boundary survey of a town, including the town with its common-field lots, out-lots, and commons, is no evidence of the location, extent and boundary of the commons, nor of any private lot marked on the plat.—*Robbins et als. v. Eckler et als.*, 494.
7. *Confirmation.*—Certified copies from the registry of claims proved before the Recorder of land titles under the act of Congress of May 26, 1824, or from the registry of certificates of confirmation or list of claims are proved, or of official surveys by the Surveyor General of the lots so proved, or a certificate of confirmation issued by the Recorder of land titles upon such survey, are admissible in evidence as *prima facie* evidence of title to the lot confirmed.—*Clark v. Hammerle*, 620.
8. *Confirmation—Survey.*—A lot was claimed and confirmed by the Recorder of land titles, as a lot of one and a half arpens in front "by about thirty arpens in depth," bounded north by Guion, south by Tabeau, east by Aug. Chouteau's mill tract, and west by Charles Gratiot. The lot was officially surveyed in accordance with the calls for boundaries, rejecting the call for quantity of "about thirty arpens in depth." *Held*—That this was the correct mode of surveying the lot proved, and that the certificate of confirmation issued properly conformed to the official survey so made.—*Clark v. Hammerle*, 620.

LANDS AND LAND TITLES—(Continued.)

9. *Ejectment—New Madrid Location.*—A defendant claiming title under a New Madrid location is in a position to dispute the correctness and validity of a *prima facie* superior title of the plaintiff under a confirmation by the act of June 18, 1812.—*Clark v. Hammerle*, 620.
10. *Abandonment.*—The Spanish law of abandonment continued in force in this State until A. D. 1816. To constitute an abandonment, there must be a departure of the owner, corporeally, from the land, with the intention that it shall be no longer his. The intention to abandon may be inferred from facts and circumstances. Ceasing to cultivate, mere inaction, removal to another place, is not enough without some act of disclaimer, or act showing an intention to disclaim ownership.—*Id.* ✓

LIENS.

See AGENCY, 6. BAILMENTS, 3, 4. REVENUE, 6, 7, 8.

LIMITATIONS.

1. *Administration.*—If the administrator give notice of the grant of letters, all claims not presented within three years will be barred, unless the creditor can bring himself within the exceptions of the statute. The presentation of the claim in the manner provided by the statute will save the limitation. Proof that the civil law was suspended, on account of the war, during a portion of the period, will not extend the time for presenting the claim.—*Richardson, Adm'r, v. Harrison, Adm'r*, 96.
2. *Practice—Irregularity.*—The party has three years within which to move to set aside a judgment for irregularity.—*Dysart's Adm'r v. Austin et al.*, 47.
3. *Damages.*—Suits for damages under the 2d section of the "Act for the better security of life," &c. (R. C. 1855, p. 647), must be commenced within one year after the cause of action accrues. If the wife of the deceased fail to sue within six months, the minor child has not twelve months thereafter within which to sue.—*Kennedy v. Burrier*, 128.
4. *Judgment—Payment.*—The lapse of a period of time of less than twenty years, with additional circumstances tending to prove payment of a judgment, may induce a presumption of payment, and authorize a jury to find the fact of payment; the presumption being stronger or weaker according to the length of time elapsed.—*Baker v. Stonebraker's Adm'r*, 888.
5. *Boats and Vessels.*—Suits, under the act R. C. 1855, p. 313, § 42, against boats and vessels upon running accounts for supplies, &c., must be brought within six months after date of the last item in the account.—*Madison County Coal Co., v. St. bt. Colona*, 446.
6. *Adverse Possession—Estoppel.*—The possession required by the statute must be with the intent of asserting an adverse title. Therefore when parties designate their division lines through ignorance or mutual mistake, the possession held by either will not be adverse.—*Knowlton v. Smith*, 507.

M

MANDAMUS.

1. *Office.*—State ex rel. *Jackson v. Auditor, &c.* (84 Mo. 375), affirmed.—State ex rel. *Jackson v. State Auditor*, 70.

MECHANICS' LIENS.

1. *St. Louis County*.—The right of an original contractor with the owner of a building, under the special act relating to St. Louis county (Sess. Acts 1848, p. 83,) to file his lien within six months after the completion of the contract was not taken away by the act R. C. 1855, p. 1071.—*Christman et al. v. Charleville et al.*, 610.
2. *Contract*.—A party seeking to enforce a mechanic's lien upon a building must show that he furnished the materials for the building, under a contract either with the owner of, or the contractor for, the building.—*Hause v. Thompson et als.*, 450.
3. *Credits*.—Where a party filing a mechanic's lien under the statute applicable to St. Louis county, of February 14, 1857, omits to give the credit for payments made, he cannot enforce his lien upon the property of the owner of the building.—*Hoffman et al. v. Walton et al.*, 618.

MORTGAGE.

See ACTION, 5. EQUITY, 12.

1. *Conveyance—Equity—Mistake*.—A conveyance intended as a security for a debt will not be treated as a mortgage in a court of law, unless the land be conveyed to the creditor upon condition. A deed between A. and B. by which A. upon a consideration received from B. conveys to A. (himself) real estate, to be void upon payment of a debt due by A. to B., cannot be foreclosed as a mortgage in a court of law; although, in a court of equity, upon proper allegations of mistake, the deed might be reformed and the equity of redemption foreclosed.—*Rackliffe v. Seal et al.*, 817.
2. *Mortgagor—Substitution*.—A. executed a deed of trust, in the nature of a mortgage, to secure a debt, and subsequently by deed poll conveyed the property to B., reciting in the conveyance that part of the consideration was the payment of the encumbrance by B.; *held*, that B. could not be considered as a mortgagor, and that a personal judgment against B. for the mortgage debt was erroneous. (R. C. 1855, p. 1089, §§ 10, 14.)—*Mason v. Barnard et als.*, 884.
3. *Fraud—Notice—Conveyances*.—The heirs of the grantor in a deed of trust in the nature of a mortgage, who has by fraudulent representations induced the trustee to release the property without the knowledge and consent of the *cestui qui trust*, take the estate with full notice, and stand in the same position as their ancestor.—*Grove v. Robards' heirs et al.*, 523.
4. *Deed of Trust—Title*.—After the maturity of the debt secured by a mortgage or deed of trust of personal property, the mortgagee or trustee has the legal title and the right to recover possession. Although the trustee may have advertised and sold the property, he may sue for the possession, so that he may deliver the property sold to the purchaser.—*Lacey, Trustee, v. Giboney*, 320.
5. *Practice*.—Under the statute of this State, the proceeding for the foreclosure of the equity of redemption of a mortgage, or deed of trust, is a proceeding at law and not in equity.—*Mason v. Barnard et als.*, 884.
6. *Deed of Trust—Instalments*.—Where a deed of trust in the nature of a mortgage, securing several notes maturing at different dates, provided, that, in default of payment of said notes or either of them, or of any one of them,

MORTGAGE—(Continued.)

or the interest thereon, as they become due and payable, the trustee might sell, &c.; upon a bill to foreclose the equity of redemption, &c., after all the notes fell due: *Held*, that the notes were to be paid and satisfied in the order in which they matured. The mere failure or neglect to pursue the remedy until all the notes become due cannot impair the rights of the parties where they have done no act which can act injuriously upon the other party.—*Mitchell v. Ladew et als.*, 526.

7. *Deed of Trust—Debt.*—The debt being the principal thing, in a mortgage or deed of trust given to secure it, the transfer of the debt carries with it the security.—*Id.*
8. *Deed of Trust—Notes.*—Where a deed of trust given to secure the payment of several notes falling due at different dates—provided, that if any note should remain unpaid after it fell due, that then all the notes should become due—the notes become due only for the purpose of distributing the fund realized by the sale under the power. Such a provision will not authorize the rendition of a personal judgment against the maker before the notes mature.—*Mason v. Barnard et als.*, 384.

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OFFICE AND OFFICERS.

1. *Justices' Courts—Execution—Constable.*—A constable sued before a justice for failing to return an execution within the proper time, may, upon a proper case made, be allowed to amend his return so as to show that the execution was returned in time, although suit may have been commenced against himself and his securities.—*Corby, Ass'ee, v. Burns et als.*, 194.
2. *Constable—Bond.*—The constable and his securities upon his official bond are liable for the constable's refusal to pay upon demand the amount collected by him upon notes or accounts given to him for collection without suit. (R. C. 1855, p. 348, § 13, & p. 988, § 121.) The giving of a receipt is not a condition precedent to his liability.—*State ex use, &c., v. Grupe et al.*, 365.
3. *Governor—Executive Power—Process.*—The Governor, representing the sovereign executive power in the State, is always virtually present in his courts for the purpose of executing the mandates and process of the courts, whenever the power of the marshal and an ordinary *posse* may not be sufficient for the purpose, or when the peace and dignity of the State may so require.—*Thomas v. Mead et al.*, 232.
4. *Constitution—Election.*—By the Constitution, Art. II., § 8, no vote can be counted for, nor any certificate of election granted to, any candidate who has not taken and filed the oath of loyalty within fifteen days next preceding the election. A certificate of election granted to one who has not thus taken and filed the oath is null and void.—*State ex inf. Att'y Gen. v. McAdoo*, 452.
5. *Constitution—Appointing Power.*—Under the Constitution, the Governor has not the power to fill by appointment a vacancy in the office of sheriff occurring after the Constitution went into effect. Such vacancy must be filled in the manner provided in Art. IV., §§ 23 & 24.—*State ex inf. Attorney Gen. v. McAdoo*, 453.

OFFICE AND OFFICERS—(*Continued.*)

6. *Mandamus*.—State ex rel. Jackson v. Auditor, &c., 34 Mo. 375, affirmed.—
State ex rel. Jackson v. Auditor, 70.

P

PARTNERSHIP.

1. *Administration—Bond*.—The creditor of a partnership under process of administration cannot sue upon the bond of a surviving partner unless he present his demand to the surviving partner to be classified within two years, or have the same allowed against the estate of the deceased partner. Unless the claim be thus presented, the partnership estate will belong to those who do establish their claims, and all others will be cut out from its benefit. (R. C. 1855, p. 125, § 63.)—State to use of Taylor v. Woods et als., 73.
2. *Administration*.—The surviving partner administering upon the effects of the partnership is obliged to account only for such effects and assets as actually come into his hands as surviving partner. Sec. 63, p. 125, R. C. 1855, has no application to the surviving partner, but to the administrator of the deceased partner, in respect to the excess of funds he might receive from the surviving partner upon such settlement.—Crow et als. v. Weidner, 412.
3. *Administration*.—Under the act R. C. 1855, p. 121, &c., the powers of the surviving partner are not changed or restricted, otherwise than that he is required to give security for faithful administration of the assets, and payment of the balance due after paying the partnership debts, &c. He is not required to pay the claims presented *pro rata*, but may pay in full such as he sees fit.—*Id.*
4. *Action—Dormant Partner*.—In case of a dormant partnership, while the credit is given to an ostensible partner because no other is known to the creditor, yet the creditor may also sue the secret partner when discovered, and the credit will not be presumed to have been given on the sole responsibility of the ostensible partner.—Richardson et als. v. Farmer et al., 35.

PAYMENT.

See LIMITATIONS.

POSSESSION.

See LIMITATIONS.

1. *Title*.—An actual possession is evidence of title, against every one who does not show a better title. In the absence of other evidence, a prior lawful possession is proof of a better title.—Summons v. Austin, 307.
2. *Sale*.—Possession of personal property is presumptive evidence of title; but where a sale is made and possession delivered to the purchaser, yet if by express agreement the title is to remain in the seller until the price be paid, the right of property is not vested in the purchaser until payment. And where the vendor has been guilty of no laches, he may reclaim the goods from a third party who took them in good faith and without notice.—Parmlee v. Catherwood et al., 479.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SECURITIES.

PRACTICE, CIVIL.

PARTIES.

1. *Guardian—Infant*.—A petition by an infant must show that the plaintiff is an infant, and sues by a guardian, or next friend legally appointed, or it will be bad on demurrer.—Higgins, *Guard.*, v. *Han. & St. Jo. R.R. Co.*, 418.
2. *Guardian & Ward*.—Where an infant sues without procuring the appointment of a "next friend," as required by the statute, the defendant may take advantage of the defect by demurrer or by answer; unless he do so the defect is waived, (*R. C.* 1855, p. 1281, § 10,) and the defendant cannot move in arrest of judgment. (*R. C.* 1855, p. 1255, § 19.)—Jones v. Steele, 324.
3. *Assignee*.—The assignee of the contractor may sue in the name of the City of St. Louis to his use, under the act of March 6, 1855, p. 25, authorizing a special tax to be enforced by proceedings at law.—City of St. Louis to use, &c., v. Rudolph, 465.
4. *Contractor*.—In a suit by the City of St. Louis to the use of the contractor, to recover the amount of a special tax levied for the improvement of a street under act of 1855, p. 25, the city is the substantial plaintiff, and a defence which would be good against the city will be available against its assignee.—City of St. Louis to use McGrath et al. v. Clemens, 467.
5. *Error—Irregularity*.—Where the plaintiff in the suit dies, the administrator can be substituted in his place only by the voluntary appearance of the defendant, or by the service upon him of a *scire facias*. To enter the appearance of the administrator and give judgment against defendant without such appearance or *scire facias*, is erroneous.—Harkness, *Adm'r*, v. Austin et al., 47.
6. *Sheriff*.—In an action, for the delivery of personal property, against the sheriff, it is proper to allow the parties interested with the sheriff to be made co-defendants, that they may defend the action and protect their interests.—Vallé et al. v. Cerré's *Adm'r*, 575.

PLEADINGS.

7. *Issue—Note*.—Where the answer denies any of the material allegations of the petition, and presents an issue of fact, it cannot be stricken out upon motion. An answer denying the endorsement or assignment of the note to the plaintiff, or alleging that the note was obtained by fraud, and that the plaintiff had notice thereof at the time of taking the note, or alleging that the note had been fraudulently altered after delivery, tenders material issues.—Mechanics' Bank v. Fowler et al., 33.
8. *Pleading—Equity—Fraud*.—A petition which seeks to set aside a patent and to hold the patentee as trustee, upon the ground of fraud, must be as definite and precise as was formerly required on a bill in chancery. It is not sufficient to make a general allegation of fraud without any other specifications of the acts which constituted it.—Hill v. Miller, 182.

See HABEAS CORPUS, 1.

PRACTICE, CIVIL—(*Continued.*)

9. *Joinder of Causes of Action.*—Several causes of action for injuries to person or property, whether real or personal, direct or consequential, and whether the damages are given by statute or by common law, single or double, may be included in the same petition.—*Clark's Adm'r v. Han. & St. Jo. R.R. Co.*, 202.
10. *Misjoinder of Causes of Action.*—Where several causes of action are joined in one count of a petition, the count will be bad on demurrer, or on motion in arrest of judgment.—*Id.*
11. *Joinder of Actions.*—A cause of action founded upon a contract cannot be united in the same count with a cause of action founded upon an injury to property.—*Ederlin v. Judge*, 350.
12. *Infant.*—A petition by an infant must show that the plaintiff is an infant, and sues by a guardian, or next friend legally appointed, or it will be bad on demurrer.—*Higgins v. Han. & St. Jo. R.R. Co.*, 418.
13. *Contract not to sue—Answer.*—A covenant or agreement not to sue upon a claim, cannot be pleaded in bar of the prosecution of an action upon such claim. The remedy of the party is by an action upon the covenant or agreement. An answer setting up an agreement not to sue, presents no defence to an action.—*Bridge et als. v. Tierman*, 439.
14. *Answer—Counter-claim.*—Where the answer sets up new matter by way of counter-claim, to which no demurrer or reply is filed, the defendant is entitled to have a judgment by default entered upon the counter-claim.—*City of St. Louis to use McGrath et al. v. Clemens*, 467.
15. *Jurisdiction.*—Objections to the jurisdiction of the court are not waived by omitting to take advantage of them by demurrer or answer, and the exception may be taken on the motion for a new trial.—*Lindell's Adm'r v. Han. & St. Jo. R.R. Co.*, 543.

TRIALS.

See DEPOSITIONS, 1, 2, 3. EVIDENCE.

16. *Variance.*—A bill was made payable at "the Bk. of Mo. at St. Louis"; the petition alleged presentment of the bill "at the Bank of the State of Missouri at St. Louis, Mo., the place designated in said bill for payment." *Held*, no variance.—*Bk. of the State of Mo. v. Vaughan et al.*, 90.
17. *Dismissal.*—After the cause was submitted to the jury and they had retired to consider their verdict, the plaintiff suggested the death of one of the defendants and dismissed the case as to him; *held*, that § 48, p. 1269, R. C. 1855, did not apply to the case, and that such dismissal was properly entered.—*Huthsing v. Maus*, 101.
18. *Mortgage—Deed of Trust—Title.*—After the maturity of the debt secured by a mortgage or deed of trust of personal property, the mortgagee or trustee has the legal title and the right to recover possession. Although the trustee may have advertised and sold the property, he may sue for the possession, so that he may deliver the property sold to the purchaser.—*Lacey, Trustee, v. Giboney*, 820.
19. *Negligence.*—The question of negligence is one of fact to be submitted to the jury.—*Kennedy v. North Mo. R.R. Co.*, 351.

PRACTICE, CIVIL.—(Continued.)

20. *Instructions*.—In chancery cases, it is not necessary to present the questions of law arising on the case by instructions.—*Hunter v. Miller et al.*, 148.
21. *Instructions*.—Courts should not state propositions of law hypothetically to a jury, where there is no evidence in the case applicable to them.—*Kennedy v. North Mo. R.R. Co.*, 351.
22. —*Instructions*.—Where the plaintiff has closed his evidence, and it has a tendency whatever to prove the issue necessary to a recovery, the court determine the whole case as a matter of law.—*Boland and wife v. Missouri R.R. Co.*, 484.
23. *Instructions*.—If the instructions given correctly state the law of the case, the judgment will not be reversed because other instructions asserting the same propositions of law are refused.—*State to use, &c., v. Wissmark et al.*, 592.
24. *Instructions*.—An instruction which refers a matter of law to the jury is erroneous.—*Vallé et al. v. Cerré's Adm'r*, 575.
25. *Instructions*.—At the close of the plaintiff's evidence, the defendant has a right to ask of the court instructions upon the case as made by the plaintiff, and to have the case submitted to the jury.—*Clark's Adm'x v. Han. & St. Jo. R.R. Co.*, 202.
26. *Verdict*.—Where a verdict is found for an entire amount of damages upon a petition containing several counts, if any of the counts be defective the judgment will be arrested.—*Id.*
27. *Practice—Amendment*.—After a judgment in favor of an infant plaintiff without the appointment of a "next friend," at the commencement of the suit, the court may upon his application appoint a next friend, and approve his bond, that the money recovered be secured to the infant.—*Jones v. Steele*, 324.
28. *New Evidence*.—The re-opening of a case, to allow a plaintiff to offer further evidence, after he has declared his evidence closed, is a matter within the discretion of the court, and will not be reviewed except where the discretion has been unfairly exercised.—*Harvey et al. v. Brooke*, 493.
29. *Jeofails*.—Although a petition be defective, yet if it appear after verdict that the verdict could not have been given or the judgment rendered without proof of the matter omitted to be stated, the defect will be cured by the statute, and the judgment will not be arrested.—*Richardson et als. v. Farmer et al.*, 35.
30. *New Trials—Newly discovered Evidence*.—In a motion for new trial for the reason of newly discovered evidence, the party must show, that by the exercise of due diligence he could not have procured the evidence he failed to produce.—*Id.*
31. *New Trial*.—If the party against whom a verdict is found and judgment given fail to file his motion for a new trial within the four days prescribed by the statute (R. C. 1855, p. 1286, § 6), but subsequently files his motion, which is overruled, no writ of error will lie from the judgment overruling the motion.—*Richmond's Adm'x v. Pogue*, 313.

PRACTICE, CIVIL—(*Continued.*)

82. *New Trial*.—The Supreme Court will not disturb a verdict on the ground merely that it is against the weight of evidence, unless it can be seen that the preponderance is so great as to imply some gross partiality, or some prejudice or misconduct on the part of the jury.—*Baker v. Stonebraker's Adm'rs*, 388.
83. *Judgment—Irregularity—Appearance*.—*Smith's Adm'r v. Rollins*, 25 Mo. 408, affirmed. A party appearing in court to move to set aside a judgment against him for irregularity, is in court for that purpose only.—*Lincoln v. Hilbus*.—149.
84. *Judgment*.—A judgment at law is an entirety—good as to all, or bad as to all the defendants. A judgment rendered jointly against the maker and endorser of a promissory note, in a suit in which the maker was not served with process, is erroneous as against the endorser, and will be reversed upon writ of error or appeal.—*Covenant Mut. Life Insur. Co. v. Clover et al.*, 392.
85. *Irregularity—Limitations*.—The party has three years within which to move to set aside a judgment for irregularity.—*Dysart's Adm'r v. Austin et al.*, 47.
86. *New Trial—Excessive Damages*.—The Supreme Court will not grant a new trial upon the ground of excessive damages, unless it appears at first blush that the damages are flagrantly excessive, or that the jury have been influenced by passion, prejudice or partiality.—*Kennedy v. North Mo. R.R. Co.*, 351.
87. *Judgment—Error*.—A judgment rendered against a defendant upon a debt not due is erroneous, and the error may be taken advantage of even after a judgment by default.—*Mason v. Barnard et als.*, 384.
88. *Demand*.—To avail himself of the want of a demand made previous to a suit, the defendant must set up the defence in his answer and tender the amount due. (R. C. 1855, p. 448, § 84.)—*State to use, &c., v. Grupe et al.*, 366.

SUPREME COURT.

See JURISDICTION. COURTS.

89. *Error*.—A judgment at law is an entirety—good as to all, or bad as to all the defendants. A judgment rendered jointly against the maker and endorser of a promissory note, in a suit in which the maker was not served with process, is erroneous as against the endorser, and will be reversed upon writ of error or appeal.—*Covenant Mut. Life Ins. Co. v. Clover et al.*, 392.
40. *Error—Motion for New Trial—Criminal Practice*.—Such errors as appear upon the face of the record, or such as may be taken advantage of by a motion in arrest or by a writ of error, will, in criminal cases, be noticed in the Supreme Court as a matter of course; but as to exceptions taken in the progress of the trial, and as to motions for a new trial and in arrest which become part of the record only by bill of exceptions, the same rule governs in criminal as in civil cases.—*State v. Marshall*, 400.
41. *Error—New Trial*.—No exception can be taken in the Supreme Court upon appeal or writ of error, to matters not appearing upon the face of the

PRACTICE, CIVIL—(*Continued.*)

- record, unless they are made part of the record by bill of exceptions and have been expressly decided by the court below, which must appear by the filing and overruling a motion for a new trial, and exceptions thereto preserved. It is not required by the statute (R. C. 1855, p. 1286, § 6) that the motion for a new trial should specify the reasons for which it is made, but that is the better practice. By the Practice Act of 1849 it was not necessary that the exceptions should be saved by a motion for a new trial. (*Fine v. Rogers*, 15 Mo. 315; *Wagner v. Jacoby*, 26 Mo. 530; *Prince v. Cole*, 28 Mo. 486; *Gray v. Heslep*, 38 Mo. 248, commented upon.)—*Id.*
42. *Error*.—Where the judgment is manifestly for the right party, the judgment will not be reversed for errors not affecting the merits of the case.—*Hunter v. Miller et al.*, 143.
43. *Error*.—Where no exceptions are saved in the inferior court, the Supreme Court will only notice errors apparent on the face of the record.—*Mason v. Barnard et als.*, 384.
44. *Appeal*.—Dismissed for failing to prosecute.—*State v. Phillips et al.*, 149.
45. *Appeal*.—Dismissed for want of assignment of errors.—*State v. Smith*, 149.
46. *Habeas Corpus—Appeal*.—From the decision of a court remanding or discharging a prisoner brought before it upon a writ of *habeas corpus*, no appeal lies.—*Ferguson v. Ferguson et al.*, 197.

PRACTICE, CRIMINAL.

See *ERROR*, 5, 6.

1. *Recognizance*.—Where a recognizance is taken by a judge who has authority to take such recognizance for the appearance of the party before the Circuit Court, it will be presumed that the necessary preliminaries were complied with, and that the proceedings were regular and proper.—*State v. Rogers et al.*, 138.
2. *Robbery—Larceny*.—A party indicted for the crime of robbery in the first degree (R. C. 1855, p. 574, § 20) cannot be convicted of robbery in the second degree (R. C. 1855, p. 594, § 21), but may be convicted of larceny. It is of the essence of robbery in the first degree, that the violence or fear of injury should be present and immediate to the person, and that the property should be actually taken from the owner's person, or in his presence, and against his will.—*State v. Jenkins*, 372.
3. *Slavery—Larceny*.—The possession of the slave is the possession of the master. An indictment, therefore, charging the defendant with purchasing from a slave, property belonging to the master, is bad on motion in arrest.—*State v. Edwards*, 394.
4. *Trial—Verdict*.—In cases of felony, the accused must be personally present at the trial, and no verdict can be entered against him except in his presence.—*State v. Braunschweig*, 397.
5. *Appearance*.—If the accused appear and plead to the indictment, no more formal arraignment is necessary.—*Id.*
6. *Jurors—Exceptions*.—Objections to the panel, or to jurors, must be preserved by exceptions.—*State v. Marshall*, 400.

PRACTICE, CRIMINAL—(*Continued.*)

7. *Venue*.—It is not necessary that the order of the court directing the sheriff to summon jurors, should be under the seal of the court.—*Id.*
8. *Witness—Evidence*.—A witness may decline answering questions which tend to criminate himself.—*Id.*
9. *Statement—Evidence*.—The statement made by the prisoner before the committing magistrate is not admissible in evidence either for or against the prisoner.—*Id.*
10. *Variance*.—An indictment charging the defendant with selling intoxicating liquors to A., is not sustained by proof of selling to other persons. The allegations and the proofs must correspond in criminal as well as in civil cases.—*State v. Hays*, 80.

PROHIBITION.

See JURISDICTION, 5.

R

REVENUE.

1. *Union Military Bonds*.—By the act of February 10, 1865, (Sess. Acts 1865, p. 56, § 31,) and the ordinance of the Convention of April 8, 1865, § 23, an appropriation was made for the payment of Union Military bonds and of the Missouri Militia, in the first class. By the act of February 15, 1865, (Sess. Acts 1865, p. 61,) the bonds were properly presented to the Auditor, to compute the principal and interest due, and draw his warrant upon the Treasurer for the payment of the bonds presented for redemption.—*State ex rel. Werkman v. Treasurer*, 49.
2. *Union Military Fund*.—The act of the General Assembly (Sess. Acts 1863, p. 27, § 9) appropriates all the moneys collected under the act to the payment and redemption of the bonds issued under the act. The expenses of assessing and collecting the tax are not to be paid out of the moneys collected for this fund.—*State ex rel. Long v. Treasurer*, 58.
3. *Secretary—Militia*.—By the act of February 28, 1865, (Sess. Acts 1865, p. 59), the Secretary of State was to be paid for his services under the act, out of any moneys in the Treasury not otherwise appropriated, and not out of the fund created by the act.—*State ex rel. Secretary of State v. State Auditor*, 65.

See ATTORNEY GENERAL.

4. *Stamp—Evidence*.—Under the act of Congress of March 3, 1863, a note executed before June 1, 1863, is admissible in evidence if the proper stamp be affixed before it is thus offered.—*Day v. Baker et al.*, 126.
5. *City of St. Louis—Sewers—Special Tax*.—Under the provision of act of March 14, 1859, (Sess. Acts 1858-9, p. 168,) the City of St. Louis has authority to direct district sewers to be made whenever the city council shall consider such sewers necessary, without a petition from a majority of the property owners or the recommendation of the board of health.—*City of St. Louis to use, &c., v. Ceters*, 456.
6. *City of St. Louis—Special Tax—Evidence*.—By the provisions of the act of Jan. 16, 1860 (Sess. Acts 1859-60, p. 882), the special tax bill, certified by

REVENUE—(Continued.)

the city engineer, is *prima facie* evidence of the liability of the person therein named as the owner of the property.—City of St. Louis to use, &c., v. Eters, 456.

7. *City of St. Louis—Special Tax—Lien.*—The right to charge the real estate fronting upon a street improved under the act March 6, 1855, (Adj. Sess. Acts 1855, p. 25, § 6) with a lien for the amount of work done, does not depend upon the completion of the contract for the whole of the work ordered, but only upon the completion of the work in front of the property to be charged.—City of St. Louis to use McGrath et al. v. Clemens, 467.
8. *Practice—City of St. Louis—Special Tax—Judgment.*—The suit against a party to recover the amount of a special tax levied under the act of March 6, 1855, p. 25, § 6, is a suit in *personam*, and authorizes a general judgment for the amount of the tax and interest as well as a special judgment against the property.—*Id.*
9. *Practice—Parties.*—In a suit by the City of St. Louis to the use of the contractor, to recover the amount of a special tax levied for the improvement of a street under act of 1855, p. 25, the city is the substantial plaintiff, and a defence which would be good against the city will be available against its assignee.—*Id.*
10. *Practice—Parties.*—The assignee of the contractor may sue in the name of the City of St. Louis to his use, under the act of March 6, 1855, p. 25, authorizing a special tax to be enforced by proceedings at law.—City of St. Louis to use, &c., v. Rudolph, 466.
11. *Constitution—Special Tax.*—Cases of Egyptian Levee Co. v. Hardin (27 Mo. 495), and City of St. Joseph v. Anthony (30 Mo. 539), affirmed.—City of St. Louis, to use McGrath et al. v. Clemens, 467.

S

SALES.

See CONTRACTS, 1, 2, 3.

STAMPS.

See BILLS AND NOTES, 4.

SECRETARY OF STATE.

See REVENUE, 3.

SECURITIES.

See ADMINISTRATION, 4, 7. EQUITY, 2, 7, 9, 12.

SLAVES.

1. *Larceny.*—The possession of the slave is the possession of the master. An indictment, therefore, charging the defendant with purchasing from a slave property belonging to the master, is bad on motion in arrest.—State v. Edwards, 394.

T

TRESPASSES.

See CORPORATIONS, RAILROAD, 2, 3, 4. DAMAGES, 6.

TRESPASSES—(*Continued.*)

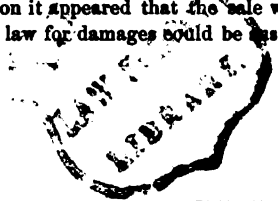
1. *Action*.—The "Act concerning trespasses" (R. C. 1855, p. 1682) contemplates voluntary or wilful trespasses only, which are done without lawful right.—*Lindell's Adm'r v. Han. & St. Jo. R.R. Co.*, 543.

U

USES AND TRUSTS.

See MORTGAGES.

1. *Conveyances—Trustees*.—In consideration of the payment of the sum of \$500, M. conveyed land to nine persons as trustees of the Methodist Episcopal Church South, and to them and their successors in office lawfully appointed forever; one of the grantees died, and another removed from the State; *held*, that the Circuit Court had no authority to fill the vacancies and appoint new trustees under the act. (R. C. 1855, p. 1554, § 1.) *Held, further*, that if the consideration was paid by the persons constituting the church, that a court of equity would, upon the application of the church, fill the vacancies existing by appointing as trustees such persons as the church might select; but if the money was paid by the grantees, that then the legal title would belong to them and no appointment was needed.—*Draper et al. v. Minor et al.*, 290.
2. *Vendors and Purchasers—Estoppel*.—An outstanding title purchased by a vendee of land in possession under a title bond, enures to the benefit of the vendor. In a suit upon the notes given for the consideration, the vendee cannot defeat a recovery upon the ground of failure of title, but will be allowed the cost and expenses of his purchase of such outstanding title.—*Ash, Adm'r, v. Holder*, 168.
3. *Equity—Purchasers*.—The trustee holds the legal estate for benefit of the *cestui qui trust*, and no act of his can prejudice the beneficiary; but if the trustee be in actual possession of an estate and sell it to an innocent purchaser, for a valuable consideration, without any notice of the trust, the purchaser will be protected.—*Grove v. Heirs of Robards et al.*, 523.
4. *Notice—Conveyances*.—The heirs of the grantor in a deed of trust in the nature of a mortgage, who has by fraudulent representation induced the trustee to release the property without the knowledge and consent of the *cestui qui trust*, takes the estate with full notice, and stand in the same position as their ancestor.—*Id.*
5. *Action—Power*.—A. sued the trustee in a deed of trust, and the holder of the notes thereby secured, alleging in his petition that by the power notice of the sale was to be given by advertisement inserted in newspapers printed in St. Louis and Franklin counties, and that notice was only published in Franklin county; and alleging also, that, by the wrongful, oppressive and fraudulent conduct of the holder of the notes, in combination with the trustee, bidders were deterred from bidding, the property was sacrificed, and brought less than parties were ready and willing to bid for it: *Held*, that as by the petition it appeared that the sale was void both in law and equity, no action at law for damages could be sustained.—*Thornburg v. Jones et al.*, 514.



V

VENDORS AND PURCHASERS.

See EQUITY, 2, 7, 8, 9, 12. SALES. CONTRACTS.

VENUE.

1. *Practice*.—In civil suits, the affidavit in support of a motion for change of venue must be sworn to by the party himself. (Levin v. Dille, 17 Mo. 64, affirmed.)—Huthsing v. Maus, 101.

W

WITNESSES.

See EVIDENCE.

WRITS.

See JURISDICTION, 4, 5.

Ex. g. a. a.



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